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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 180

MARIO MERCADO RIERA, Incompetent, by Guardian ad Litem, Rafael Mercado Mercado,

Petitioner,

vs.

ADRIAN MERCADO RIERA and MARIA LUISA MERCADO RIERA DE BELAVAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BENJAMIN ORTIZ,
CHARLES CUTHELL OTTENHEIMER, and
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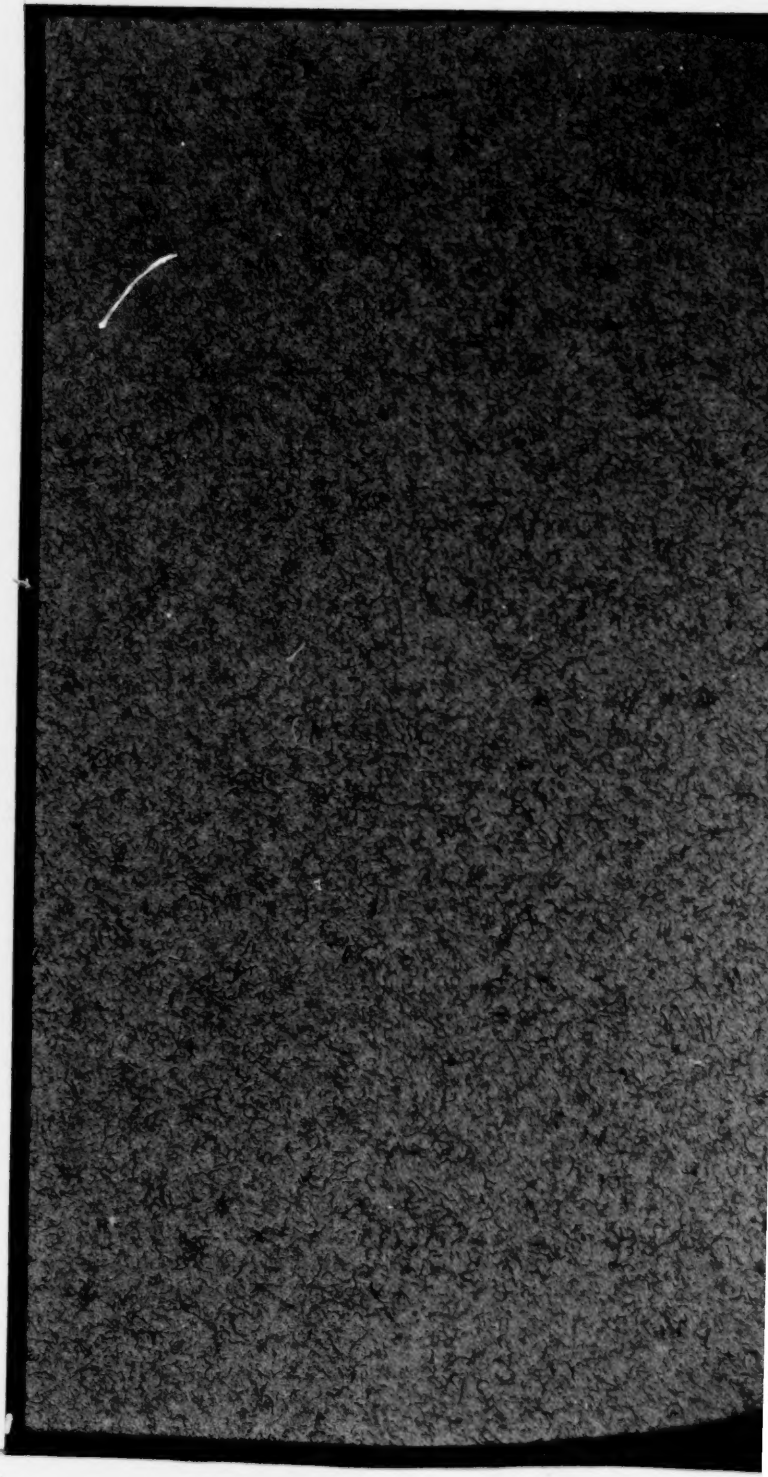
Attorneys for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 180

MARIO MERCADO RIERA, ACCOUNTING AS EXECUTOR OF THE ESTATE OF MARIO MERCADO MONTALVO,
Petitioner,

vs.

ADRIAN MERCADO RIERA AND MARIA LUISA MERCADO RIERA DE BELAVAL,
Respondents

PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mario Mercado, Jr., accounting under a contract as executor of the estate of Mario Mercado, Sr., prays issuance by this Court of a Writ of Certiorari to review an order of the United States Circuit Court of Appeals for the First Circuit, entered April 9, 1948 (R. 370), without a hearing on the merits, dismissing, under Rule 39B of the Revised Rules of the Circuit Court, an appeal of Petitioner from the Supreme Court of Puerto Rico. In the alternative, petitioner prays for issuance of a Writ of Mandamus to that

Circuit Court of Appeals that a full hearing be granted to petitioner.

Jurisdiction of This Court

This being a civil cause in a Circuit Court of Appeals, it falls squarely within the plain terms of Sec. 240(A) of the Judicial Code, as amended by Sec. 1 of the Act of February 13, 1925 (43 Statutes 938), conferring jurisdiction on the Supreme Court of the United States to require by Certiorari that any such cause be certified to the Supreme Court for determination. As above stated, the order of the Circuit Court of Appeals, review of which is hereby sought by petitioner, was entered April 9, 1948.

No petition for rehearing was filed in the Circuit in view of the strong language in which the short opinion of the Circuit is concocted and in view of the discrimination toward Puerto Rican appeals shown in Rule 39B of the Circuit Court.

For facts in addition to those contained in the statement of each point, below, see Statement of the Case, supporting brief, pages 16-26.

Questions Involved

The *Statement on Appeal* (R. 214), filed under Rule 39B before the Circuit Court of Appeals, presented to that Court two types of questions as involved here:

(A) Substantial federal questions requiring the interpretation of federal statutes (Federal Estate Tax Law, 1934 amendment) and involving the rights of a person under the United States Constitution and the Organic Act of Puerto Rico not to have his rights passed upon or prejudiced in any way without due process of law.

(B) Questions of local law, of legal and economic significance, reviewable under the theory of *De Castro* v.

Board of Commissioners, 322 U. S. 451 and *Hijos* v. *Commins*, 322 U. S. 465.

The federal and local questions of law involved in the appeal to the Circuit and now presented in this petition, may be detailed as follows:

Questions of Federal Law

I. The Federal Estate Tax Law was amended in 1934 to cover the estates of citizens of the United States, regardless of residence at the time of death. (Estate Tax Regulation No. 80, Art. 1, p. 9). Testator Mario Mercado, Sr., who became, under the Jones Act of 1917 (48 U. S. C. A. 733), a citizen of the United States, died in Puerto Rico leaving over $1,000,000.00 in personal property in the Island, and a $200,000.00 bank deposit in the National City Bank of New York City. The Internal Revenue Bureau, Estate Tax Division, attempted to tax the Mercado estate under the aforesaid 1934 amendment to the Estate Tax Law and the executor contested the attempt on the basis that United States citizens in Puerto Rico, made so by the Jones Act of 1917, were not *citizens* for the purpose of federal estate tax. Estate Tax Regulation 80, Art. 5, page 11, issued in relation to the 1934 amendment, made the case worse for Puerto Ricans by defining the term "citizen" as "*including citizens and residents of possessions of the United States who have been made citizens of the United States by treaty or act of Congress.*"

The Mercado estate was one of considerable size (over $1,000,000.00 in personalty), taxable for over $200,000.00 (Reg. No. 80, page 15). It took the executor and his attorney from the signing of the Compromise Contract (under which this suit proceeds) on September 9, 1938 to March 24, 1939 (Internal Revenue Resolutions, Appendix) to convince the Internal Revenue Bureau, Estate Tax Division, that Regulation No. 80, *supra*, was erroneous and that the

estates of American citizens from Puerto Rico were not legally subject to federal estate tax.

In this contractual accounting, when it became necessary in Puerto Rico (for the purpose of expenses, fees and reasons for the time taken in the settlement of the estate) to determine the nature of the controversy confronting the executor before the Internal Revenue Bureau (whether the whole of the estate or only part of it was subject to the tax), the Supreme Court of Puerto Rico held that the controversy raised by the Internal Revenue Bureau was limited to the $200,000.00 bank deposit in New York City (R. 157 M). But it gave no reasons for its holding.

In so limiting a controversy which plainly arose because of the citizenship of decedent and which, therefore, plainly covered the entire estate of decedent as the estate of an American citizen, the Puerto Rico court erroneously interpreted and applied the Federal Estate Tax Law, 1934 amendment, concerning the important tax problem arising from the citizenship of decedent Mercado and the amount of tax involved therein, to the injury and prejudice of the executor, affecting his rights to fees, compensations and reasons for the time taken in the fulfillment of his duties and in other matters. These questions were duly proposed before the Circuit Court of Appeals (St. on App., R. 214). In dismissing them summarily, without a full hearing on the merits, the Circuit Court committed error. (See pages 26-34 of supporting brief.)

II. The amount of the fees and expenses to which the executor and his attorney were entitled while staying in the United States discussing with the Internal Revenue Bureau and settling the obligation of Puerto Rican estates under the 1934 amendment to the Estate Tax Law of the United States, is inferentially a federal question involving the sum of $31,450.00. (Supporting brief, *supra.*)

III. This impeachment of accounts, it must be borne in mind at all times, arose from the Compromise Contract of September 9, 1938 (R. 94), representing a settlement between Partnership Mario Mercado e Hijos, the estate of decedent Mario Mercado, Sr., executor Mario Mercado, Jr., and Partitioner Pedro M. Porrata (See Compromise Contract, contracting parties, R. 94, 95). In said Compromise Contract, the obligations and liabilities of the Partnership to the estate and of the estate to the Partnership and to every other one of the signing parties, including the two objecting heirs, were established and settled by agreement (Compromise Contract, Clauses First, Second and Third, R. 94 *et seq.*)

Therefore, as party to the Compromise Contract and inventory attached thereto, wherein it acquired rights and incurred obligations, the Partnership is and was an indispensable party in these proceedings. This is conclusively proven by items of impeachment now in controversy, representing, in round figures, $109,000.00, in which items the Partnership is the only party really, legally and truly interested. (Objections to Final Accounts, R. 26; VI, R. 28 ($16,392.25); XII, R. 32, 33 ($20,019.15 plus interest); Supplemental Objections (A) R. 53, 54 ($45,359.50); (B), R. 54 ($15,535.70); (C), R. 54 ($6,841.06); (F), R. 54-55 ($5,250.00).)

Quotation from the Supreme Court Opinion:

> *"The partnership Mario Mercado e Hijos was one of the parties to the compromise contract, which was signed on its behalf by its partner and manager, Mario Mercado Riera, the accounting executor and appellant therein"* (R. 153). (Italics ours.)

In view of the foregoing, the Puerto Rico court must be understood as having acted without jurisdiction when passing upon the questions raised in the Objections without due

process of law (District Court Opinion and Judgment, R. 56, 88; Supreme Court Opinion and Judgment, R. 130, 193). However, in regard to some of the items involved ($45,-359.50, for example), the District Court declared itself without jurisdiction (R. 81) and the Supreme Court reversed (R. 186).

This fundamental question under the doctrine of *Shields et al.* v. *Barrow*, 7 How. 130, 15 L. Ed. 158, and subsequent cases, was raised below. It is patent and unanswerable on the face of the record; and therefore, in refusing to hear this case on the merits under Rule 39B of the Circuit Court and in not reversing the judgment below, fundamental error of Constitutional law was committed, requiring now a review of this case by the Supreme Court of the United States. (See pages 29-39 of supporting brief.)

IV. For the same reasons stated in Point III, Partitioner Pedro M. Porrata, signer of the Compromise Contract, was also an indispensable party to these proceedings. The Puerto Rico courts assumed jurisdiction to pass upon matters of partition affecting Porrata's rights and duties under the Compromise Contract, thereby committing the reviewable error of passing upon the contractual obligations and rights of a person without due process. This point was raised before the Circuit Court. That court also dismissed it without a full determination on the merits; and in so doing a patent and obvious error was committed. (See pages 34-46 of supporting brief.)

V. Dona Margarita Mercado, sister to the executor, did not object to the accounts (Objections to Final Accounts, R. 26, 35). On the contrary, dona Margarita shows agreement with the executor (Exhibit, R. 277-278). In giving judgment in her favor, the Puerto Rico courts gave judgment in favor of a party who did not sue, thereby denying the party against whom the judgment was rendered the

benefits of the due process clause. This matter was brought to the attention of the Circuit Court, was dismissed in the same manner that the other matters were; wherefore patent error of Constitutional law was committed requiring examination and reversal here. (See pages 51-54 of supporting brief.)

Questions of Local Law

VI. The estate tax controversy in the Internal Revenue Bureau and the complexity of the estate involved in this suit, caused inevitable difficulties in the settlement of the estate, which are usual when estates of considerable size are involved. That is why the federal statute gives fifteen months for the filing of the return (Regulation No. 80, 1937 edition, Art. 70, pp. 100-101). Interest was paid to legatees in the sum of $2,102.98 (the majority of this money was paid to sons and grandsons of the other three heirs in favor of whom the judgment was rendered) and interest was paid to the Treasury of Puerto Rico on the inheritance tax assessed—$13,432.29, corresponding to the one-half inheritance of the impeaching heirs. The chargeable interest in Puerto Rico at that time was by law 12 percent. (The executor also paid his share of interest as an heir. No other heir or legatee but the objectors complained of such interest paid.)

The Supreme Court of Puerto Rico, ignoring the nature of the estate tax controversy raised by federal officials and the complexity of the estate, committed the error of law and equity of charging the executor with the payment of the interest paid to relatives of the objectors and to the Treasury of Puerto Rico.

In so doing, the Puerto Rico court disregarded specific agreements in the Compromise Contract (controlling law of this case), as to the charging of the tax to be paid to each party's respective share in the estate (R. 111-112); the

federal estate tax lien upon the whole estate attaching at the time of death while the estate tax question remained unsettled (Reg. 80, Art. 88, *et seq.*); the economic significance and time necessarily taken in settling the federal tax controversy, and the other equities in favor of the executor; and thereby committed plain and patent error of mixed federal and local law, to which the attention of the Circuit Court was called, but the Court dismissed it without a hearing on the merits. (See pages 54-64 of supporting brief.)

VII. "Time", as used in the Compromise Contract in regard to the filing of the notice of decease by the executor, was not and could not be of the essence of the contract. The Puerto Rico courts, in refusing to admit the evidence offered by the Executor to establish the real meaning of "time" as used in the Contract, committed patent error. To this patent error the attention of the Circuit Court was called, but the alleged error was summarily dismissed without a hearing on the merits. In this as in all the other errors alleged, the Circuit disregarded the mandate of Congress vesting jurisdiction in said Court over cases coming on appeal from the Supreme Court of Puerto Rico where the required amount in controversy is involved; and it also disregarded the decisions and implied mandate in the *De Castro* and the *Commins* cases (322 U. S. 451 *et seq.*) (See pages 64-70 of supporting brief.)

VIII. In the Compromise Contract signed by the heirs (including the two objectors), the estate, the Partnership, executor and Partitioner, the debt of the Partnership to the estate was agreed to and inventoried as being $413,064.63 (Compromise Contract, R. 101, 108, 122). The Supreme Court of Puerto Rico committed, therefore, inescapable and patent error of local law (in addition to the one of Constitutional law alleged in Point III of Federal Law), when order-

ing the executor to put into the final accounts a chose in action for $45,359.50 against the Partnership Mario Mercado e Hijos. The district court of Ponce, in regard to this item of impeachment, declared itself without jurisdiction (R. 81), but was reversed by the Supreme Court (R. 186). The attention of the Circuit Court was called to this error of the Supreme in reversing the District from the standpoint of Constitutional as well as of local law, but the appeal was dismissed summarily. The error is included here for the purpose of this petition for Certiorari. (See pages 70-74 of supporting brief.)

IX. In the Compromise Contract, the debt of the Partnership to the estate was agreed to as being $413,064.63 (Error VIII *ante*). The objectors in this impeachment of accounts claim it should have been $428,600.33. The reason for the difference between the figure agreed to in the Compromise Contract and the figure now alleged by the objectors was established by proof consisting of a payment of $15,535.70 made by the Partnership and charged to the $428,600.33 debt existing when the payment was made. Therefore, an inexcusable error of local, as well as of Constitutional law (Point III, *ante*) was committed. The judgment resulted in a change of the sum agreed to between the Partnership and the estate as being the debt of the Partnership to the estate. The said debt was increased without a hearing being afforded the Partnership and in spite of the proof adduced showing the reasons for the agreement in the contract that the debt at the time of the Contract was $413,064.63 and not $428,600.33. (See page 73 of supporting brief.)

This question was raised before the Circuit Court, summarily dismissed by that Court; wherefore it is brought to the attention of the Supreme Court in this petition for a Writ of Certiorari.

X. At the time of the testator's death, there was deposited in banks in the name of the testator, $576,306.53. By agreement in the Compromise Contract, $320,306.53 was entered as an asset of the Partnership to create a reserve fund. The Treasury of Puerto Rico, which was not a party to the Compromise Contract, refused to allow this $320,306.53 passing to the Partnership as a deduction from the estate and assessed the tax on the basis of the total $576,306.53 bank deposit. The objectors were notified of the assessment and did not object to it before the Treasury. (Typewritten Record, Test. of Mr. F. Julia, Head of the Tax Bureau of Puerto Rico, T. E. 1153-1214). On the contrary, they show agreement with the computation. Under the duties imposed upon him by local law, the executor proceeded then to pay the tax (Inh. Tax Law of P.R., Sec. 9, 1941 Compilation, pp. 1176-1177). In allowing any objection to the payment made by the executor of any amount of the tax so assessed by the Treasury of Puerto Rico, the Puerto Rico court committed obvious and patent error requiring examination by the Circuit Court or by the Supreme Court now in this petition for Certiorari. (See pages 74-77 of supporting brief.)

XI. There was a deposit made by the testator with Partnership consisting of the sum of $5,250.00. That deposit was not included in the inventory of the estate, agreed to as a part of the Compromise Contract (R. 116, *et seq.*) A controversy arose as to who was the real owner of the fund. The Partnership made some payments in regard to the purpose for which the fund was created but the payments were charged to other accounts. The Puerto Rico Court committed obvious error in relation to this fund when ordering the executor to answer for it under the Compromise Contract without the Partnership being a party to the proceedings and the fund never having come into the hands of the executor. (See page 42 of supporting brief.)

XII. The house on Marina Street was being held by the testator *in usufruct* (life-estate). When the testator died, the house was being rebuilt under a contract with a certain architect. The Court held that Mario Mercado Jr., the executor who bought the house, was to take care of all expenses incurred after he became the owner of the house. This was the theory of the judgment below. When Mario Mercado Jr. became the owner of the house on September 9, 1938, over $14,200.00 had been spent on the house; yet the judgment allowed only $14,200.00. The theory of the judgment, therefore, in this particular item, conflicts with the award and the case should be remanded if not reversible for other reasons. (St. on App., R. 271-274).

XIII. The Supreme Court committed obvious error of law when reversing the decision of the District Court of Ponce in regard to the impeachment identified as "Alms to Paupers."

Reasons Relied upon for the Allowance of the Writ

The above statement of points, and the short statement of facts leading to each and every one of the points stated, show the necessity of issuing this writ and, furthermore, the necessity of re-examining the persistent attitude of the Circuit Court of Appeals in treating appeals from Puerto Rico in a different manner from appeals coming from other jurisdictions in the federal system.

There is nothing in the Opinion of the Circuit Court indicating that said court fulfilled its duties as required of it by law (Constitution: Art. III, Sec. 1; Art. IV, Sec. 3, Clause 31, Fifth Amendment; Federal Organic Act of Puerto Rico, March 2, 1917, c. 145, 39 Stat. 951, Sec. 2; Judicial Code, Sec. 128 (A), Fourth), and by the decisions of this Supreme Court in the *De Castro* and *Commins* cases (322 U. S. 451-465, p. 458). In those cases, this Court took

a different attitude from that taken by the Circuit. Instead of looking at Puerto Rican appeals, or at the particular case before the Court, in an attitude of disdain or even of regret that the case was brought to it on appeal, as the Circuit seems to have done, this Court proceeded to formulate a patently eloquent and useful rule to the effect that an appeal from Puerto Rico—

> *"imposes on the Court of Appeals and on this court the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs."*

The Court further states that that task

> *"is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved."* (Italics ours.) 322 U. S. 458.

This, however, is not a case where mere questions of local law are involved. Almost half of the record concerns the interpretation of the Federal Estate Tax Law of the United States, 1934 amendment, (Mercado's and Porrata's Testimonies T.E. 432-527; 668-961; Ruiz Nazario's Testimony, T.E. 1358-1388, 1749 (A)-1830, and Acosta Velarde's Testimony, T.E. 1471 (A)-1516 (A); D.P. 160-311, 431-433, 458-486, etc.,) (R. 340), which 1934 amendment gave rise to a considerable number of important questions present here. The basing of an action on a contract (the Compromise Contract) signed by six persons, representing a settlement of controversies among them, without joining four of them who are necessarily interested as parties to the contract, (one of them in the sum of $109,000.00) is *per se* an indication of the presence in this case of Constitutional questions deserving careful examination. The Circuit Court refused to make the examination; and the conduct of the Circuit seems to

us, therefore, to represent an error of no light consequences. The errors covered by the question of the indispensability as parties of all signers of the Compromise Contract, touch upon questions of law so fundamental that they have never escaped the careful scrutiny of the American courts.

It may be considered significant, in passing upon these questions, that neither the Puerto Rican people nor the American Congress has ever tried to obtain a change in the jurisdiction of the Federal courts in regard to appeals from Puerto Rico. We consider the reason for not wanting a change in regard to the jurisdiction as based on two grounds: (1) the necessity of keeping a watch on questions of fundamental law here in the United States in regard to matters coming from Puerto Rico, and (2) the necessity of securing uniformity of interpretation and the point of view of American judges in regard to the numerous legislation that every day the Puerto Rican legislature adopts from the United States. Today we are not a community with laws fundamentally different from American laws. On the contrary, our law almost one hundred per cent, is the American law, fundamentally speaking.

This impeachment of accounts, within which these fundamental questions are brought to this Court, is highly useful in illustrating the necessity of preserving intact the power to review, that Congress placed in the Circuit Court of Appeals and by certiorari in this Court.

Also, regardless of the attitude of the Circuit Court toward the contentions of appellant, it seems plain to us that the question of Federal law regarding the interpretation of the Federal estate tax statute, was so erroneously decided in Puerto Rico that a strong reversal is the only course possible so as to make justice to the executor. It requires no effort to understand that the 1934 amendment to the Estate Tax Law, including citizenship as the basis for imposing the tax, raised a problem for Puerto Rican estates, which

problem acquired tremendous importance for Puerto Rico and for the officials of the Internal Revenue Bureau, upon Regulation No. 80, effective October 28, 1937 at 9:35 A. M., defining the term "citizen" as follows:

> *"Every person born or naturalized in the United States (including citizens and residents of possessions of the United States who have been made citizens of the United States by Treaty or Act of Congress) who owes his allegiance to or is entitled to the protection of the United States is a citizen thereof."* (Italics ours.) (Reg. 80, p. 11M.)

Upon the death of an American citizen in Puerto Rico, as Mercado was, the problem arising therefrom could not be interpreted, by any reasonable means, as one concerning the location of any particular part of the estate, but in a wider and true sense, it was the problem of the taxability of the estate of Mario Mercado, Sr., a United States citizen dying in Puerto Rico after the 1934 amendment to the Federal Estate Tax Law. To say that it concerned only the $200,000.00 bank deposit in New York City, as the Supreme Court of Puerto Rico did (R. 157) was error, evident in every respect, affecting the executor, who as such, had to meet the controversy and incurred the corresponding expenses deriving from its self-evident magnitude.

The Mercado estate being one subjected to the payment of the tax, within the law and Regulation No. 80, the lien, upon the gross estate created by the statute (Reg. No. 80, Sec. 315 (A), p. 133) attached. The executor, therefore, encountered a problem of legal and economic significance unequal in size, new and unexpected in Puerto Rico. Consequently, the executor was bound to take precautions, to act intelligently and quickly, as the problem required examination by the United States authorities in view of the precedent to be established. When the Puerto Rican court interpreted that problem as involving only the

$200,000.00 located in New York City, it rendered an interpretation of the Federal estate tax statute, 1934 amendment, erroneous in every respect, affecting thereby the executor's rights to fees and expenses in proportion to the nature of the controversy that the executor encountered; and in not recognizing the equities arising in favor of the executor from the necessity of confronting this controversy and settling it favorably, the court acted in clear error and should be reversed.

However, the plain error committed by the Puerto Rico court in relation to the Federal question confronting the executor, before the Internal Revenue Bureau, is only one of the many powerful reasons why this case requires the issuance of this writ. As stated hereinbefore, the Compromise Contract of September 9, 1938, which is the basis of this suit (R. 35), represented an agreement between the executor Mario Mercado, Jr., the estate, the heirs (including the two objectors), the Partnership and Porrata (R. 94-95). It plainly was not an agreement between Mario Mercado, Jr., and the estate or the heirs alone.

The question that may logically be asked is this: Why were not all the contracting parties joined, when each and every one of them had a monetary interest in each and every one of the clauses of that contract? This was an accounting under a contract—not merely a testamentary proceeding. However, a testamentary proceeding is not privileged and cannot invade, any more than any other proceeding, fundamental rights of people. If the objectors contracted with the Partnership at the instance of the objectors themselves in regard to the amount of a debt from the Partnership to the estate, or in regard to all the other particulars covered under the Contract, what legal reasons did the objectors have to discuss judicially with the executor alone, matters relating to that Contract, affecting the Partnership and the other contracting parties, or to try to

obtain judgment changing or in any way affecting that contract, charging the executor with responsibilities which because of the contract became directly and plainly contractual matters between the estate and the Partnership? Or what justification does the Circuit Court show in its Opinion to dismiss the obvious Constitutional question arising in regard to the non-joinder of indispensable parties in this case, when it is apparent that the executor is being prejudiced and forced to answer for persons not joined and whose rights are necessarily affected by the judgment interpreting and adjudicating matters under the Compromise Contract? It is the new tendency, since the enactment of Rule 39B of the Circuit Court toward appeals coming from the Supreme Court of Puerto Rico, that undoubtedly induced that Court to commit the error here committed, of refusing to hear this important case on its merits.

Concerning the matters of local law alleged by us here, this Court will find that the executor is being charged, or called to answer, for monies that he disbursed or paid to third persons, to-wit: The Treasurer of Puerto Rico, legatees, many of them related to the objectors, employees of the estate, and other persons. Whether the executor is rich or poor, whether it is a matter between brothers or not; —all that is immaterial considering that the two objectors were the brothers who brought this suit, and they should not prevail in regard to any item if they are not entitled to it.

The question is whether Mario Mercado Riera, executor or no executor, is to be burdened by demands or controversies which he is not bound to meet, or whether he should settle matters and answer for parties who contracted directly with the objectors under the Compromise Contract, such as the Partnership, Porrata or the other heirs. In the accompanying brief we show how each and every one of these questions, involved now in this writ of certiorari and

disregarded by the summary dismissal, are deserving of and necessitate examination here.

This writ, therefore, should be issued. Specific rights conferred by Congress have been denied to a litigant; genuine and substantial questions of Federal law have been ignored; and questions of local law, requiring the examination of the local law in its setting, have not received from the Circuit Court the examination required by the Supreme Court in its decision in the *DeCastro* and in the *Commins* cases, *supra*. In the *Commins* case, the Supreme Court granted the full hearing, which the Circuit Court denied, so that a litigant might not be deprived of the right to appeal conferred by Congress in regard to decisions of the Supreme Court of Puerto Rico (*Hijos* v. *Commins*, 322 U. S. 465). It is our most emphatic belief that the time has arisen for a definite statement or legal adjudication protecting the right to appeal from the Supreme Court of Puerto Rico to the United States Circuit Court of Appeals, which is beneficial and in no way detrimental to the interests of the Puerto Rican people, especially when, as in this case, important questions of Federal Constitutional and local law are involved.

The petitioner has no other remedy than the writ of certiorari applied for, or, in the alternative, the corresponding writ of mandamus.

WHEREFORE, and for the reasons briefly outlined above and more fully discussed in the supporting brief, it is respectfully prayed that this Petition for Writ of Certiorari or Mandamus be granted.

In Washington, D. C., this 27th day of July, 1948.

Respectfully submitted,

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CHARLES CUPRILL OPPENHEIMER,
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Attorneys for Petitioner.

NOTE

1. The various questions of law arising out of the impeachment of accounts filed under the Compromise Contract, make necessary an extensive discussion of this petition.

2. In regard to the capacity of Mario Mercado Riera, accounting executor, under the Compromise Contract, to take an appeal to the Circuit Court of Appeals, see Answering Memorandum (R. 339-366).

BRIEF IN SUPPORT OF THE FOREGOING PETITION

Opinions Below

The Opinion of the Supreme Court of Puerto Rico on reconsideration, rendered January 14, 1947, and the one originally rendered, on May 24, 1946, are not yet officially reported in English. The Spanish text appears in 66 D. P. R. 38 and 801, Spanish edition of the reports of that Court. A translation is in the transcript of record here, on pages 130 to 196.

The Judgment of the District Court of Ponce, rendered February 19, 1942 and later modified by the Supreme Court of Puerto Rico, is inthe record on pages 56, 88-92.

The Opinion of the United States Circuit Court of Appeals, rendered April 9, 1948, to which this Petition directly relates, is in the printed record, pp. 367-370.

Jurisdiction of This Court

Petition, *supra*, page 2.

Statement of the Case

Mario Mercado, Sr., generally known as Mario Mercado Montalvo, died testate on August 22, 1937. He left four children from his matrimony with dona Eufemia Riera Dubocq. In his will be appointed Mario Mercado, Jr. as Executor. He showed confidence in this appointment by exonerating him from the necessity of posting bond and in other provisions of the will.

At the time of the testator's death, one of the heirs, Objector Adrian Mercado Riera, was residing in Italy; the other three in Puerto Rico.

Under Puerto Rico laws, there are two ways of accepting inheritances: (1) pure and simple, and (2) under the benefit of inventory (C. C. of P. R. Sec. 952).

Objector Adrian Mercado, upon arriving in Puerto Rico, accepted the estate under the benefit of inventory, alleging, "that the petitioner (objector Adrian: ours) prior to the death of don Mario Mercado Montalvo (the testator: ours) was residing in the city of Rome, Italy, whence he returned to Puerto Rico via the United States, on the 22nd of November, 1937, without having since, nor at any other time up to the present, being in possession of the property composing said estate nor any part whatsoever of them" (Contract of Compromise, paragraph four, clause 3, letter "A" (R. 96); *Mercado* v. *Mercado,* Case No. 3960, Circuit Court of Appeals, p. 774-781 at p. 779, 90 L. Ed. 1612).

ESTATES ARE ACCEPTED UNDER THE BENEFIT OF INVENTORY FOR THE INTEREST OF THE ACCEPTOR

Acceptance of estates under the benefit of inventory is covered by Sections 964 to 988 of the Civil Code of Puerto Rico, *Penne Gonzalez y de la Guerra, oppositor,* 46 D. P. R. 264 (Sp. ed.) and acceptances are made in that way in the interest and for the benefit of the acceptor, as shown by Sec. 977 of the Civil Code which reads as follows:

> "The benefit of inventory produces the following effects in favor of the heir:
>
> 1. The heir shall not be bound to pay the debts and other charges on the inheritance except in so far as the property of the same may go.
>
> 2. He retains against the estate all the rights and actions which he may have against the deceased.
>
> 3. His private property shall not be confused for any purpose whatsoever, to his injury, with the property belonging to the estate." (Civil Code of Puerto Rico, Sec. 977).

Under Section 967, the declaration accepting the inheritance under the benefit of inventory must be preceded or

followed by a true and exact inventory of the estate to be made by the accepting heir following the citation of creditors and legatees (Sec. 971). The estate of decedent involved complicated matters of accounting (Compromise Contract and Inventory, R. 94, 116). In the estate were represented the interest of decedent in Partnership Mario Mercado e Hijos, (Clause 2 and 3, R. 102-126), the estate of dona Eufemia Riera y Dubocq (R. 98-102), and the estate of decedent himself (R. 107-126). It was not until September 9, 1938, one year and eighteen days after the death of the testator, that the Compromise Contract and inventory attached thereto were agreed to by the following parties: (1) the heirs, including the two objectors, (2) the Partnership Mario Mercado e Hijos, (3) Partitioner Pedro M. Porrata, and (4) the estate (R. 94-95). Said contract provided, among other things:

> "(a) That the properties, rights and securities constituting the estate left by the testator don Mario Mercado Montalvo, are those that, *with their appraisal and liabilities,* appear set forth in the inventory which on this date and *as part of this contract of compromise,* aforesaid four heirs, make and authorize, as well as the other properties, credits, rights and securities that may subsequently exist, appear or be discovered as belonging to aforesaid testator. *This inventory shall be filed in the District Court of Ponce for the purposes of actions numbers 1213 and 782, referred to in paragraph second and fourth of this agreement.*" (Italics ours.) (R. 107).

Furthermore, the inventory agreed to as a part of the Compromise Contract (R. 117-126) was filed with the District Court of Ponce for the puposes of Case No. 1213 and Case No. 782 (R. 96, 107); the first case being that entitled "*Beneficial Acceptance and Preparation of Judicial Inventory. Adrian Mercado Riera, petitioner,*" which case became terminated with the filing of the inventory approved

as shown above, the District Court "reserving to Petitioner, don Adrian Mercado Riera, as acceptor with the benefit of inventory, of the inheritance left by don Mario Mercado Montalvo, all the rights and privileges inherent to said acceptance with the benefit of inventory" (Record in Circuit Case No. 3960, p. 779).

Furthermore, under the provisions of the Civil Code, Sec. 987, and as agreed to by the contracting parties (Compromise Contract, Clause 3, letter O; R. 114), the estate in which Partnership Mario Mercado e Hijos was interested as debtor and creditor, agreed to and proceeded to pay the expenses and lawyer's fees of the beneficiary acceptor, don Adrian Mercado Riera.

> "(o) The deed of partition referred to in paragraph (m) shall also include as a liability of the estate, the sum of Ten Thousand Dollars ($10,000.00) for payment to attorneys Jose A. Poventud and Alberto S. Poventud, only for their professional services rendered to co-heir don Adrian Mercado Riera in civil action number one thousand two hundred thirteen (1213), Acceptance of Inheritance with the Benefit of Inventory, with respect to the estate left by his testator don Mario Mercado Montalvo" (R. 114).

In regard to the filing of the inheritance tax return and the payment of the tax, the Compromise Contract provided as follows:

> "(i) Mario Mercado . . . as executor . . . shall within ten days . . . remit a notice of decease to the Treasurer of Puerto Rico . . . and, upon the liquidation of the same, *the executor shall pay for the account of each heir, as well as that of the divers legatees, that part of the inheritance tax payable by each party, charging the amount paid for each party to said party's respective share in the estate.*" (Italics ours.) (R. 111-112).

At the time of the signing of the Compromise Contract, the executor objected, alleging that he was to sail the next day for the United States to take care of the Federal Estate Tax question already raised by letter from the Commissioner of Internal Revenue in Baltimore, Maryland (Appendix). He said that he could not take care of that matter in ten days, to which Attorney Jose Angel Poventud of the objectors, replied, "time more or less in regard to those terms does not interest us, what interests us is to have something signed as between the family because to make this anew, you sailing tomorrow, is impossible" (R. 257).

IMPORTANT

When the executor was testifying about this incident during the course of the trial, the following citation from the record below reveals the difficulties encountered by the executor when dealing with the objectors and their attorneys who, after making the statement quoted *ante* to the executor, now tell the executor "Why did you rely in what I told you when you knew that I merely was acting as an attorney and not as a party to the contract?"

> "MR. POVENTUD: We ask for the elimination of what the witness has testified in relation with the Attorney, Mr. Poventud, because no agency or authority on the part of Mr. Poventud has been established, to authorize the other party neither for changing any part of the agreement between his client and the other co-heirs in relation with the obligation of the Executor as to the performance of his duty as to the filing of the notification of death, and because it is completely immaterial, impertinent and does not have any purpose, except to complicate the issue on the basis of subsequent proof of any witness which may come to impeach what the witness has said just now, and does this hearing to be made unnecessary longer" (R. 258).

> "MR. POVENTUD: And why did you rely in what I told you when you knew that I merely was acting as an attorney and not as a party to the contract" (R. 258)!

The executor sailed for the United States the morning after the day on which the Compromise Contract was signed. Upon finding that the Internal Revenue Bureau insisted upon collecting the tax upon the estate of decedent as the estate of a citizen of the United States, the executor called his attorney Pedro M. Porrata and together they discussed and tried to arrive at a decision with the officials of the Internal Revenue Bureau. This process, because of the importance of the question involved, required a long series of confernces with lawyers who were trying to settle it amicably, reach a sound conclusion and establish a precedent for Puerto Rico. The discussions lasted until March 8, 1939, and it was finally settled in favor of the estate and in the sense that the estates of Puerto Ricans were to be treated in the future as the estates of aliens for the purpose of federal estate tax (Appendix). No tax was imposed, therefore, either on the estate located in Peurto Rico or on the $200,000.00 bank deposits located in New York City, as bank deposits are not regarded as property within the United States if they belong to non-resident aliens not engaged in business in the United States (Reg. 80, Art. 50, p. 84).

Immediately upon receiving this important and favorable decision, releasing the estate from liability ($200,0000.00 or over in taxes), the executor returned to Puerto Rico and started the preparation of the local Inheritance Tax Report. By May 23, the Tax Return was already filed with the corresponding valuation; the Puerto Rico Treasury made its own investigation and the tax was finally assessed on July 9, 1939. An appeal was taken by the executor to the Board of Equalization, and as a result of the appeal, a compro-

mise was reached, saving the estate a respectable sum of money amounting to over $6,000.00 in taxes.

The objectors, in the meanwhile, did not take any steps to challenge the Treasury's assesment as provided by Section 7 of the local Inheritance Tax (Laws of Puerto Rico, 1936, p. 372). On the contrary they showed agreement with the tax as assessed. (T.E. Test. of Mr. F. Julia, pp. 1211-1213; 1186.) (R. 267-268.)

The objectors on March 4, 1940 filed under the Compromise Contract the objections to the final accounts (R. 35), raising questions affecting the Partnership in the sum of $109,000.00 or over, all of them arising under the Contract, (Objections to Final Accounts, R. 26; VI, R. 28 ($16,392.25); XII, R. 32, 33 ($20,019.15 plus interest); Supplemental Objections (A), R. 53, 54 ($45,359.50); (B), R. 54 ($15,-535.70); (C), R. 54 ($6,841.06); (F), R. 54-55 ($5,250.00)); and did not join Petitioner Porrata (R. 112-113) who was also economically interested in the interpretation of the contract.

The Judgment of the District Court was rendered on February 19, 1942 (R. 56). This court held, among other things, already mentioned in the petition for writ of certiorari, that the estate tax controversy was limited to the $200,000.00 deposited in New York City (R. 65), refused to pass, or declared itself without jurisdiction in regard to various items of impeachment involving rights of the Partnership arising under the contract (R. 82), passed upon other rights of the Partnership also arising under the contract, charged the executor with the payment of interest, and rendered its final decree as shown on page 88 *et seq.* of the printed record.

The Supreme Court of Puerto Rico modified the decision of the District Court in various respects shown in the record, pp. 130-193; assumed jurisdiction upon all matters affecting the Partnership, reversing thereby the District Court in regard to all points where that court refused to

assume jurisdiction, and confirmed the Judgment of the District Court as modified.

Appeal was taken to the Circuit Court; bond was posted by the executor in the sum of $125,000.00; appellant pointed out specifically the questions of Constitutional, Federal and local law involved (R. 214-278), but the appeal was dismissed summarily under Rule 39B of the Circuit Court (R. 367-370). In so dismissing the appeal, the Circuit Court committed plain and obvious error; wherefore, this petition is filed.

Discussion of the Points Raised in the Petition

The District and Supreme Court below erroneously interpreted the Federal Estate Tax Law in regard to the nature and significance of the controversy raised by the Internal Revenue Bureau as well as in regard to the ten years lien created by the Federal Estate Tax Law.

For the purpose of a number of items involved in this impeachment of accounts (payment of interest, impeachments VII and XII, R. 28 and 32; fees and expenses, Impeachment IX, R. 30, and other impeachments) both sides presented evidence, oral and written, to establish the nature of the Federal estate tax controversy (Mercado and Porrata's testimony; Typewritten Record D.P. 160-311; T.E. 432-527; 668-961). In passing upon the Federal question, the Supreme Court and District Court below, expressed themselves as follows:

> "With respect to the Federal Tax controversy, the Court is of the opinion that said matter did not prevent in any way the use of monies possessed in Puerto Rico, as the 'transfer certificate' (Exhibits Nos. 42 and 43) from the Federal Internal Revenue Bureau *shows that the only sum which was not available to the estate, by reason of the federal estate tax controversy, was the sum of $200,000 located in the City of New York, U. S.,*

which were deposited in the National City Bank, and which were not available unless a release or transfer certificate were previously obtained from the Government." (Statement of the Case, Opinion and Orders of the District Court of Ponce, R. 65). (Italics ours.)

> "The controversy with the federal government cannot be considered as a sufficient justification for the executor to refrain from paying the legacies at the proper time. *That controversy was limited to the sum of $200,000 which was deposited in the National City Bank, in the city of New York, in the name of the testator. The executor could not dispose of that sum without first obtaining the corresponding release or transfer certificate.*" (Statement of the Case, Opinion and Orders, Supreme Court of Puerto Rico, R. 157.) (Italics ours.)

The above holding of the Puerto Rico court is erroneous from either of two standpoints: (1) Nature, extension, significance and meaning of the estate tax controversy; (2) nature and significance of the lien established by Federal law upon the estates of decedents subject to the tax. This, of course, involves and embodies a plain and substantial Federal question, the meaning and significance of which or even the necessity of reversing the judgment below, may be further illustrated as follows:

I. Estate Tax Regulation No. 80

Estate Tax Regulation No. 80, filed with the Federal Register, October 28, 1937 at 9:35 A.M., referring to the 1934 amendment to the Federal Estate Tax Law, reads thus:

> "The Revenue Act of 1934 amended the Revenue Act of 1932 by increasing the rates for the computation of the additional tax with respect to the estates of decedents dying on or after May 11, 1934, and also by Title II and Title III amended and supplemented certain provisions of the Revenue Act of 1926 and the

> Revenue Act of 1932, effective 11:40 A.M., eastern standard time, May 10, 1934. This Act placed the estates of nonresident citizens of the United States in the same category with *estates of residents by making the specific exemptions applicable and by including for tax personal property situated outside the United States.*" (Italics ours.) (Regulation No. 80, 1937 Ed., art. 1, p. 9.)

Federal Estate Tax Return, form 706, is required for the estates of all citizens since the 1934 amendment (Reg. No. 80, art. 63, p. 96; Porrata's testimony, Typewritten Record 608-961).

The 1934 amendment, therefore, placed the estates of non-resident citizens (decedent Mercado was a non-resident citizen) in the same category as the estates of residents by including for tax personal property situated outside the United States, as shown from the citations above.

The term "citizen of the United States" was defined by Estate Tax Regulation No. 80, art. 5, p. 11, as follows:

> "Every person born or naturalized in the United States *(including citizens and residents of possessions of the United States who have been made citizens of the United States by treaty or Act of Congress)* who owes his allegiance to or is entitled to the protection of the United States is a citizen thereof." (Italics ours.)

As Mario Mercado Montalvo, decedent, was a citizen of the United States made so by the Organic Act, (48 U. S. C. A. 733), no reasonable person can contend that upon his death, the 1934 amendment and Regulation No. 80 did not offer a paramount problem for his estate, which was not a problem of mere situs of property but a problem of the taxability of the estate of decedent as a citizen of the United States.

The holding of the Puerto Rico Court is erroneous from Standpoint No. 1—that is, the nature of the controversy before the Internal Revenue Bureau.

It is clear, therefore, that the holdings of the District and Supreme Court below regarding the Federal controversy as limited merely to the $200,000.00 deposited with the National City Bank, in New York City, are erroneous, and utterly so. $200,000.00 would have meant a $26,000.00 tax, more or less (Reg. 80, p. 15), while the whole estate of decedent, consisting of approximately one million dollars in personalty, entailed a tax of over $225,000.00.

The Federal tax statute, Reg. No. 80, defining citizenship, and the fact that decedent was a citizen entitled to the protection of the flag, bear us right as to the true nature of the controversy, to an extent rarely known in law.

It was not $200,000.00 that was involved in the controversy; it was the estate of non-resident decedent Mario Mercado Montalvo, citizen of the United States, whose "gross estate" under the statute was to be determined "by including the value at the time of his death of *all property*, real or personal, tangible or intangible, *wherever situated*, except real property situated outside of the United States." (Reg. No. 80, p. 9 and 46, Art. 14.)

Mercado Estate

The Mercado estate subject to computation for tax purposes appears from the Compromise Contract (R. 94-126). The estate was represented by a considerable amount of personalty. There was a credit against the partnership for $413,064.63 (Compromise Contract, R. 101, 108 and 122); bank deposits in the name of the testator for the sum of $576,306.53 (R. 109), which the Treasury of Puerto Rico treated as wholly his for tax purposes (Typewritten Record P.D. 127-128). The purely conventional valuation made by the heirs in the Compromise Contract, which did not include the $320,306.53 passing to the Partnership (R. 109), places the estate at $1,338,932.21 (R. 123). Liabilities, including mostly obligations not deductible for estate tax purposes

(such as legacies), amount to $409,501.73. Under the Federal Estate Tax Law, one million dollars pays $222,000.00 (Reg. No. 80, p. 15).

It is proven, therefore, that the estate in controversy under the Federal Estate Tax Law was one involving over one million dollars in personalty; that the controversy covered the whole estate (and not only the $200,000.00 deposited in New York City) as the estate of an American citizen, and that the tax to be imposed, if the controversy had been lost to the estate, was one so large comparatively that it required the most strenuous effort and care on the part of the executor; and it is not less clear that the Federal Internal Revenue Bureau was not acting on mere caprice but, on the contrary, their attempt to collect the tax was warranted on the face of the 1934 amendment to the Estate Tax Law (which was posterior to the Organic Act of Puerto Rico enacted in 1917), and the definition of *citizen* of the United States as given in Regulation No. 80, which was binding upon the tax collectors within the Bureau.

II. The Federal Lien Weighted Over the Entire Estate

The courts below committed error no less patent in regard to the lien created by Section 315 as amended by Section 613 (b) of the Revenue Act of 1928 and as further amended thereafter. Said section provides:

> "(a) Unless the tax is sooner paid in full, *it shall be a lien for ten years upon the gross estate of the decedent*, except that such such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien

herein imposed." (Italics ours.) (Reg. No. 80, Sec. 315 (a), p. 133.)

The transfer certificate (Appendix) issuable under Art. 62 of Regulation No. 80, upon the Commissioner being satisfied that the tax upon the estate is either paid or provided for, is not the same thing as the lien. This transfer certificate was issued when the Bureau decided that the entire estate of Mercado was to be treated as the estate of a nonresident alien (Appendix). As Mercado, Sr., was not engaged in business in the United States geographically speaking (Reg. 80, Art. 5), his bank deposit, as the deposit of an alien for tax purposes, was not to be regarded as property within the United States:

> "Under the provisions of section 303 (e) the amount receivable as insurance upon the life of a nonresident decedent (nonresident alien decedent if death occurred after the enactment of the Revenue Act of 1934) and any moneys deposited with any person carrying on the banking business by or for such a decedent not engaged in business in the United States at the time of his death shall not be deemed property within the United States." (R. 80, p. 84.)

That is to say: The ruling regarding citizen Mercado as alien for tax purposes, placed the $200,000.00 bank deposit in the city of New York, as not property within the United States, and it was then that the transfer certificate came into play.

The lien upon the estate of testator Mercado, Sr., we submit, could not legally and morally be released by the executor himself and on his own accord without running into difficulties or showing bad faith toward the officials of the Internal Revenue Bureau. These officials were themselves in good faith, making a thorough examination and advancing this controversy for settlement out of court.

CITATION OF OTHER PROVISIONS FROM REGULATION No. 80

The estate tax statute and Regulation No. 80 imposed other obligations upon the executor:

Art. 62 covers the question of the certificate issuable to permit the transfer of property, which certificate was confused by the Courts below with the lien attaching at the time of death. *Page* v. *Skinner*, C. C. A. Colo. 298 F. 731, 26 U. S. C. A. 827. Art. 79, Reg. 80, p. 117 covers the obligation of the executor to pay the tax regardless of the fact that the gross estate consists of property which did not come into his possession; and Art. 102 provides that:

> *"If the Executor, before paying all the estate tax, pays, in whole or in part, any debt due to the decedent or the decedent's estate, or distributes any portion of the estate, he is personally liable, to the extent of such payment or distribution, for so much of the estate tax as remains due and unpaid"* (Reg. No. 80, Art. 102, p. 153). (Italics ours.)

Petitioner finally contends that it is patent that the controversy over the estate of decedent was not a minor one. It was hard, long and difficult for all—beginning with the officials of the Internal Revenue Bureau, whose extreme diligence, attention and goodwill in a matter so delicate, affecting indirectly the Island of Puerto Rico, cannot be ignored. They, as well as the executor, were confronted by a law and a regulation; both subsequent to the Organic Act of Puerto Rico, specifically extending the tax to all American citizens regardless of residence. Any argument that may regard this controversy as an easy matter is, therefore, to be taken as arbitrary and without justification; and in failing to see the true nature of this controversy, the Puerto Rico courts committed a patent error of federal law which the Circuit Court should have reversed, or in any case, was not entitled to dismiss without a hearing on the merits.

The Smallwood Case

The *Smallwood* case, now before the Board of Tax Appeals, is a very strong illustration of what has just been stated. It is also a complete answer to the interpretation given by the courts below to the controversy in the *Mercado* case before the Internal Revenue Bureau. Smallwood was born in the United States. He left an estate in Puerto Rico, where he lived almost all his life and died, and where he made his money. The Treasury Department refused to regard the doctrine of the *Mercado* case as applicable, in spite of Section 9 of the Organic Act (48 U. S. C. A. 734) because Smallwood was a United States citizen. On an estate about one-third the size of Mercado's, a $133,038.26 tax was imposed. The case is now before the Board of Tax Appeals and will be in courts for some time. The Court may require information on this case from the Secretary of the Board of Tax Appeals for illustration purposes.

Items Affected by the Plainly Erroneous Interpretation of the Courts Below

The erroneous interpretation of the federal Estate Tax Law and Regulation No. 80 alleged by us here as committed by the courts below, affects the following items of impeachment:

1. Expenses and fees and reasonability of expenses and fees in the tax controversy in the United States. A fee in a controversy where $26,000.00 was saved would not be the same as a fee where over $200,000.00 was saved. The law works one way if the whole estate was subject to the tax and in another way if it was only the $200,000.00 deposit (Impeachment No. IX) (R. 30).

2. Interest charged to the executor for delay in settling the inheritance tax matter. If there was a lien upon the whole estate and the controversy was an unusually significant one, the court below, it is believed should be bound

to modify its judgment in regard to fees and expenses (Impeachment XII) (R. 32).

3. Payment of interest to legatees because of the delay in the settlement of the federal and local tax question. If the delay was caused by a controversy involving the whole estate and because of the lien, the situation should be considered in a different light and the executor treated accordingly (Impeachment No. IX) (R. 30).

Federal Question in Relation to Fees and Expenses

And, of course, it is a federal question which is also explained by what has been said above, the one arising in relation to the payment of fees ($18,000.00) and expenses ($13,450.00) of the executor and his attorney who served him in the United States, covered specifically in impeachment No. IX (R. 30; Opinion of the Supreme Court, R. 161), for the services rendered to the estate in connection with the federal estate tax controversy and related matters under the federal Estate Tax Law. This question is admitted as federal by appellees themselves in their cross-appeal to the Circuit Court.

The Compromise Contract Under Which the Objectors Filed This Impeachment of Accounts Was Executed and Constitutes an Agreement Between Four Parties Originating in Section 967 of the Civil Code of Puerto Rico, the Four Main Contracting Parties Being the Following: (1) The Heirs, Including the Two Objectors, (2) Executor Mario Mercado, Jr. and Partitioner Pedro M. Porrata, (3) the Mercado, Sr. Estate, and (4) Partnership Mario Mercado e Hijos, Which, Under Local Law, Is an Independent Personality, and Which Was the Principal Creditor and Debtor of the Estate, and, Therefore, the Courts Below Were Lacking in Power to Change, Add or Detract or in Any Way Alter or Amend That Compromise Contract

Adjudicating or Even Prejudicing the Rights of the Partnership, Unless the Partnership Was Given a Day in Court.

This judicial controversy, it must be kept in mind at all times, arose from the Compromise Contract (Impeachment of Accounts, allegation 16, R. 35). The Compromise Contract is a settlement executed by the heirs, including the two objectors, the estate, the Partnership Mario Mercado e Hijos, Partitioner Porrata and Executor Mario Mercado, Jr. (Compromise Contract, R. 94-95, Supreme Court Opinion, R. 153). Under the local law of Puerto Rico a partnership is a legal entity, the same as a corporation or individual (Civil Code of P. R., Sec. 1560; *Puerto Rico* v. *Russel & Co.* (1933), 288 U. S. 476, 77 L. Ed. 903). The interest of the partnership in the Compromise Contract is to be found from the beginning to the end of that contract (R. 94-126), which, under local law became the contract and law governing the relation of all contracting parties (C. C. 1044, *Claussells* v. *Salas*, 51 D. P. R. 89 S. Ed.). The attempt in this impeachment of accounts to change the agreements in that contract or to interpret same with plain disregard of due process in items or particulars involving over $109,000.00, the courts below taking different positions in regard to some particulars, shows the presence in this case of a very meritorious and actual federal question, upon which we may further elaborate as follows:

Objector Adrian Mercado Riera Accepted This Estate Under the Benefit of Inventory

1. As shown in the Statement of Facts, when testator don Mario Mercado, Sr. died, three of the four heirs were residing in Puerto Rico; the other one was residing in Italy.

Under local law, there are two ways of accepting estates: (1) Pure and simple, and (2) under the benefit of inventory (Civil Code of P. R., Sec. 952).

2. Adrian Mercado Riera accepted the estate under the benefit of inventory (See Statement of Facts, *ante.*)

3. Estates are accepted under the benefit of inventory for the private interest of the acceptor, who tries to protect himself against the possible insolvency of the estate (See Statement of Facts, *ante.*)

4. The acceptor, under the benefit of inventory, must make an inventory after the citation of creditors and legatees (See Statement of Facts, *ante.* Civil Code of P. R., Sec. 971).

SPECIFIC PROVISION OF THE CONTRACT IN REGARD TO THE INVENTORY

The Compromise Contract with the inventory of the estate was finally agreed to on September 9, 1938. In relation to said inventory, the Compromise Contract provides:

> "(a) That the properties, rights and securities constituting the estate left by the testator don Mario Mercado Montalvo, are those that, *with their appraisal and liabilities,* appear set forth in the inventory which on this date and *as part of this contract of compromise,* aforesaid four heirs, make and authorize, as well as the other properties, credits, rights and securities that may subsequently exist, appear or be discovered as belonging to aforesaid testator. *This inventory shall be filed in the District Court of Ponce for the purposes of actions numbers 1213 and 782, referred to in paragraph second and fourth of this agreement"* (R. 107). (Italics ours.)

THE INVENTORY BECAME THE JUDGMENT OF THE DISTRICT COURT OF PONCE AT THE INSTANCE OF DON ADRIAN MERCADO RIERA

Furthermore, the inventory signed as part of the Contract of Compromise became, as agreed to above, a judgment of the District Court for the purposes of case No. 1213 as well

as for the purposes of Case No. 782; the first case being that entitled: "Beneficial Acceptance and Preparation of Judicial Inventory, Adrian Mercado Riera, Petitioner," which case became terminated with the filing of the inventory approved as above indicated, the court "reserving to petitioner, don Adrian Mercado Riera, as acceptor with the benefit of inventory, of the inheritance left him by don Mario Mercado Montalvo, all the rights and privileges inherent to said acceptance with the benefit of inventory" (Case No. 3960 of the Circuit Court, *ante*).

THE EXPENSES OF THE BENEFICIARY ACCEPTOR WERE PAID BY THE ESTATE

Under the Civil Code, Sec. 987, and, as agreed to by the contracting parties, the estate in which Partnership Mario Mercado e Hijos was interested as debtor and creditor, agreed to and proceeded to pay the expenses and lawyer's fees of the beneficiary acceptor, objector don Adrian Mercado Riera, as appears from the following agreement in the Compromise Contract:

> "(o) The deed of partition referred to in paragraph (m) shall also include as a liability of the estate, the sum of Ten Thousand Dollars ($10,000.00) for payment to Attorneys Jose A. Poventud and Alberto S. Poventud, only for their professional services rendered to co-heir don Adrian Mercado Riera in civil action number one thousand two hundred thirteen (1213), Acceptance of Inheritance with Benefit of Inventory, with respect to the estate left by his testator don Mario Mercado Montalvo" (R. 114).

THE PARTNERSHIP IS AN INDISPENSABLE PARTY TO THESE PROCEEDINGS, IF NOT THE MAIN PARTY

The Compromise Contract and inventory, representing a settlement between the contracting parties, whereby the objectors obtained fundamental concessions from the part-

nership (R. 109-110, *et seq.*), the partnership cannot be regarded but as an indispensable party to this impeachment of accounts, filed under the Compromise Contract, as shown or illustrated by the following summary:

1. The District Court of Ponce declared itself without jurisdiction to pass upon Additional Objection, letter (A), covering the amount of $45,359.50, expressing itself as follows:

> "The court concludes that this proceeding for an accounting is not the appropriate one for a decision as to the title in favor or against a third party; *said party in this case being Partnership Mario Mercado e Hijos, which is not subject to the jurisdiction of this Court in the present proceeding for a final accounting by the Executor*" (R. 82). (Italics ours.)

See cases cited by the District Court (R. 82).

The Supreme Court, on the other hand, reversed the District Court ordering an amendment to the inventory, as follows:

> "The *accounting Executor* is ordered instead to include the alleged credit in the inventory and in the final accounts of the Executorship, as a chose in action belonging to the heirs of Mario Mercado Montalvo, without prejudice to any right of the partnership Mario Mercado e Hijos may have to allege and prove that it does not owe said sum" (R. 195). (Italics ours).

The Supreme Court in its Opinion expressed itself as follows:

> "We have carefully examined the whole evidence. We regard it as ample and sufficient to establish prima facie the right of the opposing heirs to have included in the inventory as a chose in action belonging to the estate, their right to claim the payment of the alleged loan" (R. 187).

No court is authorized to pass upon and to prejudice rights as the Supreme Court of Puerto Rico did, as shown above. The partnership was and is a real and indispensable party to these proceedings. The court below simply did not have jurisdiction and there is nothing it could do to prevent that reality, or to exercise it unwarantedly. If a person is entitled to a hearing for the whole of a case, as both judgments below, one expressly and the other impliedly, admit as to the partnership, he is entitled to a hearing in regard to each and every part of the case. So the partnership had the right to be heard in regard to the existence of a *prima facie* credit against it, and certainly it does have the right to be heard in relation to a change in the inventory, to the confection of which it assisted as a party obliging itself thereby.

The same question arises in regard to the judgment of the District and Supreme Courts changing the Compromise Contract in relation to the $413,064.63 agreed to as a debt of the Partnership to the Estate (Compromise Contract, R. 101, 107; Inventory, R. 122) by adding to said debt the additional sum of $15,535.70 (Objections to Accounts, R. 54, Opinion District Court, R. 82-83, Opinion Supreme Court, R. 193-94).

> "The court orders that the executor include in his final accounts the sum of $428,600.33 instead of $413,-064.63, which appears in the final accounts as a 'credit owned by the testator against the Partnership Mario Mercado e Hijos' " (Opinion District Court, R. 91).

> "3. The order appealed from is modified in the sense of ordering the accountant to enter in his final account the sum of $428,600.33, in lieu of the sum of $413,064.63, which originally appeared in that account as the amount of the credit owned by the decedent against the partnership Mario Mercado e Hijos; but the accountant is authorized to include as a liability in his final account the sum which, according to the liquidation made by the

Treasurer and the vouchers in his possession, was paid to the Insular Treasury as income taxes owed by the testator at the time of his death" (Opinion Supreme Court, R. 193-94).

2. And a similar constitutional question arises in relation to the interest to be paid on the divers notes issued by the partnership (Clause First, letter (E), Compromise Contract, R. 101, Impeachment VI, R. 28), which represents a covenant concerning the Partnership exclusively.

"*Discussion of the Constitutional Question*

The judgment in this case is void and cannot be sustained. Partnership Mario Mercado e Hijos is not a party to this proceeding and it is unconstitutional to issue a judgment in relation to the contractual rights of the Partnership without making it a party to the action as required by the due process clause.

And it cannot be said that the judgment binds the Executor alone as the Constitution forbids that a person be forced to answer for another person's obligation. Partnership Mario Mercado e Hijos is an entirely separate entity; and regardless of how this situation is examined, the Partnership must be made a party for the valid interpretation of the Contract subject to controversy in that part of it affecting the Partnership. (Executor's brief before the Supreme Court, p. 69.)

"The lower court held that it was incumbent on the Partnership Mario Mercado e Hijos to pay the $16,-392.25, as interest on the sum owed by it to the heirs. The Executor maintains that the holding is erroneous." (Supreme Court Opinion of the Case, R. 152.)

"The Partnership Mario Mercado e Hijos was one of the parties to the Compromise Contract, which was signed on its behalf by its partner and manager, Mario Mercado Riera, the accounting executor and appellant therein." (Supreme Court Opinion, R. 153.)

3. The same in relation to Impeachment No. XII, covering the sum of $20,019.15 paid by the executor to the Insular

Treasury as inheritance tax for the account of the objectors over one-half of the $320,306.53 which was to "enter in full and be an asset of Mario Mercado e Hijos" according to the Compromise Contract. (R. 109, Opinion of the District Court sustained by the Supreme Court, R. 90.)

> "(I) In connection with the item in the final accounts entitled 'Inheritance Tax and Interest thereon paid to the People of Puerto Rico for the account of the four co-heirs, $129,331.64', it is ordered by the court that the executor make restitution to the final accounts in favor of the objectors Adrian and Maria Luisa Mercado Riera, the following amounts, with legal interest thereon, to wit:
>
> | | |
> |---|---|
> | For interest paid on the inheritance tax | $13,452.29 |
> | For inheritance tax on monies belonging to the partnership Mario Mercado e Hijos ..... | 20,019.15 |
> | Total ..... | $33,471.44" |

(District Court's Opinion, R. 90)

4. And the same in relation to the "Family Mausoleum Fund", Supplemental Objections, Letter (F), for the sum of $5,250.00 appearing in the books of the Partnership in relation to which item the District Court was reversed by the Supreme Court (Opinion District Court, R. 85-86; Opinion of the Supreme Court, R. 189):

> "On June 22, 1931, Mario Mercado Montalvo, after withdrawing from the bank aforesaid deposit which, at that time, with interest, amounted to the sum of $5,250, entered said sum in the partnership 'Mario Mercado e Hijos', through 'voucher' No. 1306, according to an item entitled 'Family Mausoleum Fund' the following appearing from the explanatory part of said voucher (Exhibit No. 40):
>
> *"Cash delivered by don Mario Mercado Montalvo for adornment to and termination of the family mausoleum."* (Italics ours.)

"It has also been proved that the mausoleum of the executor's grandfather was moved from one cemetery to another and that works of art have been imported from Italy for the purpose of adorning the mausoleum; *but these expenses have been paid from other funds*, the amount of $5,250 of which the item 'Fund for Family Mausoleum' consists having remained intact." (R. 85). (Italics ours.)

"The court is of the opinion, and it so orders, that this sum, as properly belonging to the co-heirs, should be included in the assets to be distributed and set forth in the general inventory of the hereditary properties, and that it should be delivered, by the partnership Mario Mercado e Hijos, which has it on deposit, as soon as demand is made upon said partnership. (Arts. 1666 and 1675 of the Civil Code, 1930 Ed.) (District Court Statement of the Case, Opinion and Orders, R. 86.)

"The order of the lower court denying the request of the contestants for the inclusion in the final accounts of the sum of $5,250.00, which appears in the books of Mario Mercado e Hijos under the title 'Fondo Panteon de la Familia (Family Burial Vault Fund) is reversed. In lieu thereof the accounting executor is ordered to include in the assets of the estate the sum of $2,625, that is, one-half of the Family Burial Vault Fund which belongs to the four heirs of Mario Mercado Montalvo." (Judgment of the Supreme Court, R. 195.)

5. The partnership as a signer was a party interested fundamentally in every other item agreed to in the Compromise Contract.

Citation of Cases

The rights acquired and settlement made by the Partnership in connection with the Compromise Contract are vested rights of the Partnership. No court has power to pass upon them or touch them partially or wholly without due process. The obligation to respect vested rights and to see that all requirements are complied with, is not the province of the

Legislature alone, but it is also the duty of the courts (*Ladner* v. *Siegel*, 148-699, 298, Pa. 487, 68 A. L. R. 1172).

The Compromise Contract was even more than a mere Contract; it had the effect of *res adjudicata* as being one entered into in avoidance of litigation (See Civil Code, 1715) and it is impossible to read that contract without realizing the interest of a Partnership Mario Mercado e Hijos therein.

The lack of an indispensable party in a proceeding of this nature, goes to the very heart of the judicial process and raises a question broader than a mere question of jurisdiction. As decided in the leading case of *Shields et als.* v. *Barrow*, 7 How. 130, 15 L. Ed. 158, a court cannot make a final decree unless all parties essentially affected by the decision are before the court. Persons having rights which must be affected by decree can not be dispensed with. On a bill to rescind a contract, all those substantially interested in the contract should be made parties. This is specially true where the indispensable party can be reached by process as in our case. *Gross* v. *Scott Mfg. Co.*, 48 F. 40. When a party is shown to be indispensable as Partnership Mario Mercado e Hijos is in this case, for the purpose of items covering over a hundred thousand dollars, the court can not proceed with the case at all, under the theory of *Shields* v. *Barrow, supra*, and *Barney* v. *Baltimore City*, 6 Wall 284. The equity rule allowing courts to proceed where parties are only proper or necessary applies mainly to cases where the absent party cannot be reached by process and never applies when the party is indispensable. Sec. 737, Rev. Statute U. S. and Equity Rule 47.

The case of *Gregory* v. *Swift et al.*, 39 Fed. Rep. 708, interprets the equity rule in regard to indispensable parties, called necessary in that case. It holds that in a suit for the proceeds of a note, alleged to have been disposed of by one of the defendants in violation of a contract, by which he had

agreed to hold it "subject to the joined order and direction of the named attorneys of adverse claimants of the note, the contract having been made on abandonment of an arbitrator award respecting the ownership of the note," such adverse claimants, who were beyond the jurisdiction of the court, are involved to such an extent that equity rule 47 and Revised Statute U. S. 737, providing that where persons, otherwise necessary or proper parties, are beyond the jurisdiction of the court, the court may proceed to a decree not prejudicing the rights of such persons, without making them parties, are inapplicable, and no decree can be rendered until the adverse claimants are made parties. In this case we quote from the specific language of the court:

> "In Coiron v. Millaudon, 19 How. 113, it is held that the fact that such persons are beyond the jurisdiction of the court is not a sufficient reason for omitting to make them parties, because neither the act of Congress nor the 47th equity rule enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree."

The case of *Hawes* v. *First Nat. Bank,* of the Eighth Circuit, 229 Fed. Rep. 51, is strictly in point. Said case lays the rule that we think will govern the decision of this Court after full argument on the merits: An embarrassed debtor made an agreement with his creditors (corresponding to the Compromise agreements in ours) whereby the property of the debtor was turned over to a committee of creditors with powers to sell.

The committee sold certain land to a citizen of another State (Illinois) and certain creditors filed a bill asking the court to administer the trust. The buyer applied for intervention, which was denied and an order was entered appointing receivers. On appeal, the court not only considered the buyer of the lands an indispensable party, but also decided that the debtor was an indispensable party

to the action and dismissed the suit, declaring the judgment void and remanding the case with instructions to proceed accordingly. The court said:

> *"It is said no objection was made below as to the absence of Franklin, but it is made here; moreover, we must notice it ourselves, if it is jurisdictional. If the court below had no jurisdiction it could not decide the merits of the controversy. Nor can we discuss them. There seems to be no alternative but to reverse the decree below and remand the case to the District Court,* with instructions to cause all property seized by its receiver to be returned to the persons from whom it was taken, by proper conveyances if necessary, and to tax the costs of the action and the costs and expenses of the receivership against the appellees, complainants below." (*Hawes* v. *First Nat. Bank*, Eighth Circuit, 229 Fed. Rep. 51.) (Italics ours.)

We do not think it necessary for the time being to cite any more cases in support of this fundamental question of constitutional law relating to the powers of the Judiciary. In due time all this question will be fully analyzed. The doctrine of *Shields* v. *Barrow, ante*, clearly is to the effect that judicial procedure is void where indispensable parties are not before the court and that *a bill to rescind a contract cannot be maintained where the effect of the suit would be to set it aside as to the parties before the court, and leave it in full force as to persons who are not parties to the suit*, which probably is the unbelievable pretention of objectors in this case.

Any argument based upon the stipulation in Clause 3rd, letters (A and F) of the Compromise Contract (R. 107, 110-111), must be considered as without merit. In so far as the partnership is concerned, the contract represents a final settlement. The provision in the contract adjudicating in equal parts property discovered later (R. 110-111) does not authorize the changing of specific agreements in the

Compromise Contract without due process, or the passing without due process upon the Partnership's rights and obligations; which is the result being procured by the objectors in this controversy.

Any argument that the executor is the one supposed to answer for the partnership, should be dismissed as preposterous. It would be a very convenient thing for the objectors, who own a very substantial portion of the partnership business, to throw the contractual obligations of the partnership upon somebody else. However, this cannot be done constitutionally speaking, *for the objectors contracted with the partnership as a separate entity and must face the partnership in the substantive as well as in the procedural aspect, pertinent and relating to the contract.*

The same Federal question arising in these proceedings in regard to Mario Mercado e Hijos, arises in regard to Partitioner Porrata.

COMPROMISE CONTRACT

As stated hereinbefore and as plainly apparent from the Compromise Contract, the contracting parties agreed as to the partition as follows:

> (m) The partitioner's report on the estate left at the death of don Mario Mercado Montalvo, shall be executed by aforesaid partitioner and aforesaid four universal heirs. *Said don Pedro M. Porrata, present at the execution of this document, undertakes to have said partitioner's report prepared within a term of ten days from the payment of the inheritance tax in this case and in accordance with the provisions of the present contract,* which cannot be altered except with respect to the description of the properties or goods of the estate, nor modified, added or amplified in any manner whatsoever; and said Mister Porrata agrees that his total fee for the study, preparation and execution of aforesaid partitioner's report on the distribution of the inher-

itance as provided in this contract, with four certified copies to be furnished the heirs, should be and shall be twenty thousand dollars ($20,000.00), etc." (Contract of Compromise, R. 113.) (Italics ours.)

HOLDING OF THE PONCE DISTRICT COURT

Passing upon the question of partition, the District Court of Ponce provided as follows:

> "For the reasons set forth above, in addition to Articles 588, 599, and 592 of the Code of Civil Procedure (1933 Ed.) the court is of the opinion that a final order should be entered modifying the final accounts of the executor in conformity with the decisions contained in the present statement of the case and opinion; providing that, according to law and justice, the surplus resulting from said modification of the final accounts, in cash or in real property, *be divided among the persons entitled to it, to-wit, the four co-heirs of testator Mario Mercado Montalvo, whose names are Mario Mercado Riera, Margarita Mercado Riera, Adrian Mercado Riera and Maria Luisa Mercado Riera,* after payment of the debts of the decedent and the expenses of administration; all without any special taxation of costs, that is, that each one of the litigating parties pay their own cost and the fees of their respective attorneys." (R. 87.) Italics ours.)

Sec. 592 of the C.C.P. of P.R., cited by the District Court of Ponce, reads as follows:

> "The final decree in any accounting shall contain the provision that law and justice required *for the distribution of the surplus, in money or in property, remaining after the payment of the debts of decedent and the expenses of administration* among those entitled thereto by law." (Italics ours.)

In that part of the opinion and judgment quoted above, the District Court of Ponce followed the language of Sec. 592 of the Code of Civil Procedure of Puerto Rico, which ap-

plies to this estate and is binding upon the courts below (Supreme Court Opinion on Reconsideration, R. 196).

Opinion and Judgment of the Supreme Court

While the Supreme Court, relying on *Mercado* v. *District Court,* 62 D.P.R. 350, 369, which the Circuit Court considered as not applying to matters of distribution (*Mercado* v. *Mercado,* 150 Fed. 2nd) limited the final order of the court, to the distribution among the heirs, of any resulting balance, in cash or credits or choses in action which may not have been allotted as yet by virtue of the Compromise Contract:

> "The previous apportionment of the properties, made by the heirs themselves in virtue of the Compromise Contract, was acknowledged by this Court in Mercado *v.* District Court, 62 D.P.R. 350, 369. Hence, it was not necessary to make any pronouncement, such as the one contained in the order appealed from, regarding the allotment of the properties, which the heirs had already apportioned among themselves, share and share alike.
>
> The order appealed from should be modified in the sense of limiting its effects to the distribution among the heirs of any resulting balance in cash or in credits or choses in action, which may not have been allotted as yet by virtue of the Compromise Contract." (Supreme Court Opinion, R. 192.)
>
> "The order appealed from is modified in the sense of limiting its effects to the distribution among the heirs of any resulting balance, in cash or in credits or choses in action, which may not have been allotted as yet by virtue of the Compromise Contract." (Supreme Court Judgment, R. 192.)

Opinion of the Circuit Court About Porrata's Interest

In *Mario Mercado Riera, Executor* v. *Maria Luisa Mercado Riera de Belaval, et al.,* Case No. 3960 of the Circuit

Court, Justice Woodbury, in all probability, realizing that it would be contrary to the due process clause to bind Porrata's interest in the Compromise Contract unless he was properly allowed a day in court, decided that Porrata is not officially affected by the judgment rendered by the Court below. "His only duty is specifically to apportion the assets and liabilities of the decedent among the heirs when the estate is turned over to them by the Executor." "Thus Porrata has no concern with the judgments of the court below on the two motions in both of *which are involved only matters of accounting and administration.* And he has no concern with the judgment on the petition of Maria Luisa and Adrian, since, although it orders the estate turned over to the heirs, *it does not specifically apportion it among them, but only provides that it shall be divided according to the Compromise Contract, which Porrata says he has done and for which he has been paid.*"

The Court further states that Porrata's arguments seem to be that he fulfilled his duty within the time agreed to in the Contract and that the heirs wrongfully refused to accept the deed of partition prepared by him. And it further states:

> "But the short answer to Porrata is that only final decision of the Supreme Court are reviewable by us on appeal (128 of the Judicial Code, 28 U.S.C.A. 225) and the final decisions of the court below are embodied in its judgments, not in opinion, and its judgments, as we have shown, do not affect Porrata." (Mercado Riera *v.* Mercado Riera, 152 F. 2d 86) (R. 241-242).

It seems from the language quoted above that if the Circuit Court would have interpreted that the judgment in that case affected Porrata, the judgment would have been reversed as rendered without due process.

In Our Judgment the Supreme Court Below Interprets the Opinion in Mercado Riera *v.* Mercado Riera Different from the Circuit Court

The Supreme Court below does not seem to have the same understanding of that judgment in the previous incident that the Circuit Court had, as shown by its language quoted *ante*, used when passing upon the question raised about the partition of the estate. The Circuit Court understood that judgment as limited to matters of accounting and administration or, in any way, not affecting Porrata. The Supreme Court understands it as covering matters of partition, *to which Porrata was and is an indispensable party under the Compromise Contract.* The unfortunate thing about all these proceedings, however, is that the courts in Puerto Rico are taking jurisdiction to pass judgments and prejudice the rights of parties not properly before them or deliberately ignored so as not to face their defense, and yet we have been unable to convince the Circuit Court that such procedure is contrary to essential justice and should be remedied without delay.

Questions of Local Law Involved in This Case

This question of due process, at the same time, involves a very important question of local law, for it appears that the judgment of the Supreme Court reversing that of the District, is contrary to Section 592 of the Code of Civil Procedure. If the District Court below was exercising probate jurisdiction, in so doing it was bound to follow the statute. The Supreme Court cites no local law in support of its judgment while the District Court cites the Code of Civil Procedure and its judgment follows strictly the language of the Code. The Citation that the Supreme Court made of the previous Mercado case carries with it no force in matters of partition in view of the language in the Opinion of the

Circuit Court in that case on appeal that it was limited to matters not affecting Porrata and suggesting that, we repeat, if the judgment was to be interpreted as reaching matters concerning Porrata, then it had to be considered as rendered without due process.

Dona Margarita Mercado Riera did not object to the accounts and the rendering of a judgment in her favor is a denial of due process.

DONA MARGARITA DID NOT IMPEACH

1. This Federal question raises the constitutional power of the District Court of Ponce and the Supreme Court of Puerto Rico to pass judgment in favor of dona Margarita Mercado Riera, who, as it appears from the record (R. 26 and 35, allegation XVI), did not impeach the accounts of the Executor, or who may even be considered as having specifically joined the Executor in support of the accounts. (R. 277-278, Margarita's motion before the District Court.)

2. Let us examine the record to determine how this question arose: To begin with, this impeachment of accounts and every item involved therein, are to be examined and passed upon in the light of the stipulation and covenants contained in the Compromise contract. The impeachment itself, subdivision 16, *ante*, says so expressly:

> "In accordance with aforesaid Contract of Compromise of September 9, 1938, 3rd clause, sub-paragraph Second, demand is hereby made upon co-heirs Mario and Margarita Mercado Riera", etc. (R. 35.)

Furthermore, the objection to the final account of March 4, 1940, begins as follows: "Now come don Adrian Mercado Riera and dona Maria Luisa Mercado Riera de Belaval, two of the four co-heirs or parties interested in the estate involved in the above case", etc. (R. 26.) Every document

in the record and all the minutes of the Court and each and every one of the impeachments of account, show patently that the only objectors to this account were don Adrian and dona Maria Luisa and that don Mario and dona Margarita did not object.

> "The heirs Adrian Mercado Riera and Maria Luisa Mercado Riera de Belaval filed objections and exceptions to the following items:" . . . (Opinion and Judgment of the Supreme Court, R. 131.)

Items of Impeachment Bear Us Right

A further examination of the accounts shows that in relation to two of the items of impeachment, only the one-half corresponding to the two objecting heirs, was included in the objections (Objections No. XII, R. 33M). Nevertheless, in relation to the other items, the Executor was ordered to reimburse the estate for the entire amount of the money disbursed. No regard was had for the fact that neither dona Margarita nor don Mario impeached the accounts.

> "Where on the settlement of the account of a guardian who had been removed, the guardian appointed in his place failed to appear, though citation was issued, a judgment by the court of its own motion rejecting the first guardian's account, and requiring him to pay a balance found due to the minor, to the second guardian, *cannot be rendered, since courts of justice can only grant relief, or give judgment, in favor of those who invoke their aid.*" (Dowd *v.* Morgan, 23 Miss. (1 Cushon) 587.) (Italics ours.)

Decision of the Supreme Court

3. When the District Court of Ponce passed judgment and did not exclude the share corresponding to the non-impeaching heirs, appellant assigned this as an error. Passing upon the error assigned, the Supreme Court below, in our

judgment, misinterpreting the contractual nature of this controversy, expressed itself thus:

> "(3) The third assignment presents a question which offers no difficulty whatever. The appellant Executor complains of his being compelled to restore the amount mentioned in the judgment appealed from as if the four heirs had objected when only two of them have actually challenged the accounts. The only reasonable interpretation of the judgment is that the Executor should restore to the hereditary estate the sums which, according to the judgment, he has improperly disbursed. When making the final payments to the heirs, each of these, the contestants, as well as those who failed to challenge the accounts, will be entitled to receive one-fourth of the total amount restored to the estate." (R. 150).

The ruling quoted above disregards the contractual origin of this impeachment of account, and the Compromise Contract under which it arose. It must be considered, to begin with, that the Executor himself is one heir, that there was a possibility that the Executor, as an heir, be in agreement with one or more of the heirs over one or many items of disbursements involved in this controversy. As an illustration that that possibility is present throughout this case, see dona Margarita's motion before the District Court of Ponce in Case 782 (R. 277-278), specifically joining the Executor in regard to some of the items of impeachment involved in this controversy. Had dona Margarita objected to the accounts, the Executor would have been able to show that she was in estoppel to do so.

> "In other words: the heirs of Esther Bessie Boerman own 99.63% of the estate. Their claim, therefore, should be limited to their proportional share." (Boerman *v.* herederos de Boerman, 52 D. P. R. 617).
>
> "If a person interested in an estate wishes to contest an account presented for settlement by the executor or administrator, he must make proper objections, and

take proper exceptions. . . ." 24 C. J. p. 1006-1007, Sec. 2448.

Judgment in Favor of One Who Does Not Sue Clearly Denies Due Process

That a judgment in favor of a party who did not sue denies the benefit of the due process clause to the defendant, is a legal proposition that may be considered self-evident; and in this case, it is more so than in any other, because of dona Margarita's appearance included as part of the Statement on Appeal, which appearance, it is believed, confirms our judgment that dona Margarita was not interested in the objections.

Questions of Local Law

Now we come to the questions of local law, in relation to which, we believe, the court below committed patent and inescapable errors.

In regard to these questions of local law, we may say at the start that, various items of impeachment, involving large sums of money and presenting questions of federal law, at the same time, involve questions of local law. The items to which we refer here are those in which the partnership Mario Mercado e Hijos is directly concerned and those items connected with the estate tax question presented by the Internal Revenue Bureau of the United States.

Let us start with the items of impeachment consisting of the interest paid to legatees and the interest upon the inheritance tax imposed by the Treasurer of Puerto Rico:

The Supreme Court incurred a manifest and inescapable error when, in disregard of the testator's will and the law of this case as represented by the Compromise Contract, it ordered the executor to reimburse the estate with the interest paid to legatees, $2,102.98 (impeachment VII) and with half the interest paid to the Treasury of Puerto Rico

on the inheritance tax assessed and corresponding to the share of the two impeaching heirs, $13,452.29 (Impeachment XII (A).

To begin with, the interest paid to the legatees is specifically provided in the will by the testator, who, in all probability, knowing the intricacies and embarrassment of his estate, provided that payment of interests to legatees as an income to them to compensate them while the estate was in condition to pay their legacies.

The testator willed:

(a) Legacies for sons and grandsons of heir dona Margarita Mercado Riera	$130,000.00
(b) Sons of heir dona Maria Luisa Mercado Riera	30,000.00
(c) Sons of heir don Mario Mercado Riera (the executor)	30,000.00
(d) Donation agreed to between the parties for the minor son of heir don Adrian Mercado Riera	10,000.00
(e) Legacies to other persons intimately connected with the testator	80,000.00
Total	$280,000.00

Therefore, of the $2,102.98 paid as interest to legatees (Impeachment VII, R. 28), over half of it went to the sons and grandsons of the other three heirs.

The above facts clearly show this to be a case in which, a party already benefited by these legacies, tries through an impeachment, to enrich himself against one co-heir by making him pay to the estate something that the objectors have already received.

Now let us go ahead with the over-all situation: In the first place, and disregarding the Compromise Contract for the time being, the tax payable on the inheritance being a charge against the estate (Inheritance Tax Law of P. R., Sec. 9), and the interest paid to legatees being provided in the will itself and being also a charge against the estate, neither the tax nor the interest can be transferred or charged to the executor without a powerful legal and equitable justification for it. In other words, the transfer of the duty to pay that interest and tax, from the estate to the executor, cannot be made unless the necessary ingredients are found in the facts and the law of this case to equitably and legally justify that transfer.

Let us take the tax question and examine it more in detail: The period covered from the death of the testator, August 22, 1937, to the payment of the inheritance tax to the People of Puerto Rico, February 27, 1940, may be divided in three periods:

(a) From the testator's death, August 22, 1937, to the signing of the Compromise Contract, September 9, 1938.

(b) From September 9, 1938 to May 3, 1939, on which date the Executor, after settling the federal tax controversy, filed the notice of decease of the testator.

(c) From May 3, 1939 to February 29, 1940, during which time the tax was finally assessed, appeal was taken and settlement was made with the government of Puerto Rico.

Period (a): The period identified above as period (a) covers all the time from the death of the testator, August 22, 1937, to the date of signing the Compromise Contract, September 9, 1938, and the main things during this period are:

Objector Adrian Mercado Riera was living in Italy when the testator died. Upon his arrival in Puerto Rico late in November 1937, he filed his beneficiary acceptance of the estate, raising a cloud of doubt upon its solvency. A legal battle necessarily ensued, as a consequence of which the Compromise Contract was signed on September 9, 1938, and as shown from that Compromise Contract, the estate of the testator was not known until then (R. 94-126; see Clause 3rd, pp. 107-116).

When examining this question of local law raised herein, this Court will have to determine why it is that the Puerto Rico courts are penalizing the Executor for not being able to determine the assets and liabilities of the estate before September 9, 1938, when it is plain from the Compromise Contract that the determination of these assets and liabilities was impossible because of claims and counter-claims and other matters concerning this highly embarrassed estate, accepted under the benefit of inventory, which presupposes, when that mode of acceptance is justified, a possible bankruptcy of the estate.

But, there is something more: The Supreme Court of Puerto Rico quotes from the local inheritance tax law, section 5, the provision of that statute requiring the Executor to inform the Treasurer of Puerto Rico the assets and liabilities of the estate, viz:

> "(Section 5, "An Act to Modify and Extend the Inheritance Tax, amended by Act No. 136 of 1939 (Laws of 1939, p. 672).)
>
> "The above-cited Section 5 of the Inheritance Tax Act imposes on every executor or person authorized to administer an estate, the duty 'to transmit to the Treasurer of Puerto Rico within the sixty days following the date of the death of the decedent whom he represents, a sworn notification of death of said decedent, stating plainly: the name and residence of said decedent; the date of his death; . . . and as nearly as possible,

> the amount, valuation, description, and location of the estate of the decedent; etc.' The Treasurer for just cause may grant an extension not exceeding sixty days for the filing of said notification, Section 9 of the same Act provides that the inheritance tax shall be paid 'within the term of one hundred and eighty days after the death of the decedent'; and if it is not paid within said term, 'interest at the rate of 1 percent for each month or fraction thereof shall be charged and collected thereon.' " (R. 159).

However, that quotation does not go far enough, for the local inheritance tax, being an inheritance tax law, as distinguished from an estate tax law, requires also, in said Section 5, cited by the Supreme Court, that the executor include in the return:

> "... the names and degrees of relationship of the heirs, divisees and legatees and the *proportionate part and description of the estate accruing to each.*" (Laws of 1939, page 672-4, Sec. 5). (Italics ours.)

It seems plain that by September 9, 1938, neither the executor nor anybody else, was in a position to pay the proportionate share corresponding to either the heirs or the legatees. Moreover, the beneficial acceptance of the estate made by Objector Adrian Mercado himself made this task impossible. Why? Because since the estate was accepted beneficially, nothing could be done with the estate thus accepted by the executor or by anybody else until the inventory was agreed to and approved.

Then, why charge, under the provisions of the inheritance tax law, Section 5, quoted *ante*, the executor with interest that he could not legally avoid, accruing while the estate remained unknown to all parties concerned? However, that the charging of the executor with such interest was legally unwarranted, is conclusively shown by the Com-

promise Contract, which is the main and leading law of this case.

THE LAW OF THE CONTRACT

The first local law to be examined for the purpose of determining the validity of our statements made above, is the Compromise Contract. What does the Contract say? In Clause 3rd, letter (i) (R. 111-112), the Compromise Contract entered into September 9, 1938, specifically authorizes the Executor to pay the inheritance tax upon the liquidation of same by the Treasurer and *to charge said inheritance tax to the account of each heir and against their respective share in the estate.* Let us copy the exact wording of the agreement:

> "(i) Don Mario Mercado Riera, as executor of the deceased, shall within ten days following this date, *remit a notice of decease* to the Treasurer of Puerto Rico in connection with the estate of don Mario Mercado Montalvo and, *upon the liquidation of the same,* the Executor shall pay *for the account of each heir,* as well as that of the divers legatees, that part of the inheritance tax payable by each party, *charging the amount paid for each party to said party's respective share in the estate.*" (R. 111-112). (Italics ours.)

The agreement quoted above was entered into on September 9, 1938. As everybody is presumed to know the law (C. C. Sec. 2), the contracting parties are conclusively charged with knowledge that at the time of the signing of the Contract there was interest accrued, since February 18, 1938, to be paid on the principal of the tax.

Under our Civil Code, Sec. 1050, the obligation to give a specific thing includes that of delivering all the accessories, this being also a principle of universal law. Interest is an accessory of the principal and follows it.

"Interest follows the principal as the shadow does the substance." Havener *v.* Brodbeck, 83 Misc. 9, 11, 144 NYS 418, Hatcher *v.* Lewis, 4 Rand. (25 Va.) 152, 157. To the same effect McVeigh *v.* Howard, 87 Va. 599, 13 SE 31, Jones *v.* Williams, 2 Call 6 Va. (102).

Interest was not excluded when the parties specifically contracted as above indicated, authorizing the Executor, upon the liquidation of the tax by the Treasury of Puerto Rico to pay it *for the account of each heir,* (not for the account of the Executor), as well as that of the divers legatees "charging the amount paid for each party to said party's respective share in the estate." (R. 111-112). *This of course, included the right to charge the share of objector don Adrian and dona Maria Luisa Mercado Riera with the amount of the tax and interest paid thereon.*

The right to charge interest extends, not only to that already accrued at the time of the signing of the contract, but it also extends to the interest that would accrue for the ten days agreed to in the Contract for the filing of the notification of death, *and it necessarily extends also to the interest to accrue for all the time that the Treasurer of Puerto Rico employed in the liquidation of the tax, as well as all the time necessary to take an appeal against the assessment, which appeal the Executor took in order to obtain an advantageous settlement, which he did obtain, saving the estate $4,730.18.* (Typewritten Record, T. E. Pages 1208-1209).

Therefore, under the agreement contained in the contract, as to charging the heirs with the tax to be paid, the only interest that could be subject to discussion would be that accruing during period classified as letter (b), *ante,* page 47; that is the period while the Executor was in the United States taking care of the estate tax controversy with the federal government and while he was here in

Puerto Rico, as a servant of the heirs, preparing the inheritance tax return. This period covers from September 19, 1938, when the Executor was supposed to present the tax return, to May 3, 1939, when he actually presented it.

The other two periods (a) and (c), page 56, *ante*, cannot be subject to discussion, for as already shown, it was specifically agreed in the Contract quoted *ante*, that the tax to be paid with interest after liquidation by the Treasurer *was to be charged by the Executor to the share in the estate of each and every one of the interested parties.*

(1) Total interest paid to the People of Puerto Rico, which the Supreme Court erroneously ordered to be restored by the Executor for the two impeaching heirs	$13,452.29.
(2) Less interest for period (a) covering from February 18, 1938 to September 19, 1938, while the inventory was being made under the beneficiary acceptance of the estate, and period (c) which represents the time taken by the Treasurer to liquidate the tax.....	9,147.56.
(3) Which leaves a remainder of..... representing interest accrued while the tax return was being prepared and while the Executor remained in the United States taking care of the Federal tax controversy.	$ 4,304.73,

Now let us see, more specifically, about period (b) from September 19, 1938 to May 3, 1939, during which period the Executor successfully took care of the Federal tax controversy and prepared and filed the local tax return.

From what we have been able to show in our discussion of the first Federal question, we think there can be no

doubt that two different governments were claiming taxes from this estate. The Federal Government was claiming an estate tax, the Government of Puerto Rico was claiming an inheritance tax; the first one functions upon the whole estate, the second upon the share of each heir and legatees, which must be determined before the return is made.

The Executor took care of the Federal question first. The Federal claim involved a larger amount of tax and represented a new and intricate claim, upsetting, we may say, this inheritance. Even though this claim was not specifically mentioned in the Compromise Contract, being a legal obligation and duty imposed by law, it is understood as included therein and that the Executor had to comply. So, the Executor sailed for the United States immediately upon signing the Compromise Contract. After six months of continuous efforts, he was able to secure the release of the estate, *without having to recur to Court,* which is one of the elements to be considered when evaluating equities in this case and in determining responsibilities in relation to this complicated inheritance.

Immediately upon receiving the resolution releasing the estate of citizen Mario Mercado Montalvo from Federal estate taxes, the Executor returned to Puerto Rico and continued the preparation of the Puerto Rican inheritance tax return. As the preparation of the return was a complicated matter and required the valuation of the estate for inheritance tax purposes, it was not until May 3, 1939 that this valuation was ready and filed with the Treasurer of Puerto Rico.

Whether the Executor should be penalized by charging him with the interests paid to the Treasurer of Puerto Rico for this period (b), while he was taking care of the Federal estate tax controversy and preparing the local

inheritance tax return, is a matter that we also submit, as we must, to the equitable judgment of this court, our understanding being that instead of penalizing the Executor, he should be rewarded for everything he did during this period to help the Federal Government reach a conclusion as to the non-applicability of the Federal estate tax to American citizens in Puerto Rico. The payment of each heir of interest during this period, and because of that controversy, can only be regarded as the natural consequence of the inheritance of large sums of money, and there is no justification to take anything that happened within that period as a basis for penalizing the Executor. (Only the two objectors, of about 13 heirs and legatees, filed any objections to the Executor's accounts). The interest accrued during this period (b) amounts to $3,228.55 and $1,076.18, in this way:

During the discussion of the Federal tax controversy	$3,228.55
During the preparation of the local inheritance tax return	1,076.18
Total	$4,304.73

The Executor saved the estate over $200,000.00 in Federal taxes; wherefore, the amount paid in interest during this period (b) is a plainly unfounded and unequitable charge. The Executor should be credited with the full amount saved, for he who comes to equity must perform equity.

In reference to period (c), we have already shown that, under the Compromise Contract: (1) the Executor shall file the return within ten days from the date of the contract; (2) the Treasury was then to assess the tax, and (3) the Executor was then to pay the tax assessed and *charge the amount paid to each party's respective share*

in the estate (R. 111-112). Why should the Executor pay for the interest accrued while the Treasurer was making his investigation and assessing the tax? The Treasurer took 115 days to make the assessment. Certainly we cannot make the Executor responsible for the time taken while the case was being appealed to the Board of Equalization and Review. This resulted in a benefit for the estate of $4,730.18 (T. E. 1208-1209). If the Executor is to be penalized with the payment of interest, we repeat, all the benefits obtained through his efforts should have been credited to him, or else what kind of justice is to be rendered to executors?

However, as stated heretofore, the Compromise Contract provided for the executor to pay the tax assessed and charge it to the share of each one of the parties interested in the estate (R. 111-112). That should be sufficient to conclude that even if interest for period (b) is chargeable to the Executor (which we deny), periods (a) and (c) cannot be so charged since the law of the contract plainly forbids.

Summary of Contention

Summarizing the contention of the executor: it is to the effect that there is no legal or equitable reason for charging him with the payment of interest for any of the three periods in which we have divided the time covered from the death of the testator to the payment of the inheritance tax; that regardless of what the court may think about the second period, the Compromise Contract itself expressly authorizes the executor to charge the heirs with the principal and interest of the tax up to the time of the signing of said contract, and up to the ten days provided therein for the filing of the notification of death (period a) and also for all that time required by the Treasurer to

assess the tax (period c), including the time used by the executor to take the appeal, which resulted in a benefit to the estate in the amount of $4,730.18.

Either from the equitable standpoint, and specially from the standpoint of the contract, which is the law governing the relations of the contracting parties, the judgment below in this respect is inescapably wrong and should be reversed.

However, the refusal of the District Court to admit evidence to show that time was not of the essence of the contract in relation to the second period from September 19, 1938 to May 3, 1939 and that the conditions as to time were waived by the parties at the time of signing, leads us into another question of local law, which reads:

> "The Supreme Court of Puerto Rico incurred a patent and inescapable error when not reversing the decision of the District Court of Ponce eliminating from the record the evidence adduced by the executor to establish the real meaning of 'time' as used in Clause 3rd, letter (i) of the Compromise Contract where it is stated that 'DON MARIO MERCADO RIERA, as Executor of the deceased, shall, within ten days following this date, remit a notice of decease to the Treasurer of Puerto Rico . . . "

This point of local law raises a question of evidence which arose as follows: the executor testified that, when he was about to sign the Compromise Contract, he arose from his chair and said: "I will not sign that contract because the period of time set in it is of impossible fulfillment. Then, I repeat (addressing Mr. Poventud, attorney for the objectors) remember that Your Honor told me: 'time more or less in regard to those terms does not interest us, what interests us is to have something signed as between the family because to make this anew, you sailing tomorrow, is impossible.' Then I signed under

those conditions for if Your Honor would not have told me that, I would not have signed that document on September 9" (T. E. 406-407, R. 257).

During his testimony, in various parts of it, the executor tried to establish the fact that he signed the contract because he understood that time was not of the essence, that it was merely directive and that it was waived by the parties, and the executor intended to keep on presenting evidence as to the meaning of time as used in the contract. After that evidence was introduced and at the end of the testimony of the witness, came a motion to strike from attorney for the objectors, (this whole incident is discussed in the T. E. pp. 550-574; memoranda 575-582; R. 257) and the court entered an order eliminating the evidence introduced as to the nature of time in the contract and disallowing the presentation of any other evidence in relation to that matter (T. E. 594-597; R. 257).

The substance of this incident is that all the parties being together, when the time came for signing the contract by the executor, the executor objected to the signing of same because of the conditions as to "time," conflicting with his duties toward the Federal government; and Attorney Poventud, who was acting for don Adrian Mercado Riera, told the executor to sign—that time was immaterial.

Mr. Poventud's answer in open court to the testimony of the witness was that he did not have authority to speak for his client, but he did not deny that he spoke as the witness testified. Mr. Poventud expressed himself thus:

> "Mr. Poventud: We ask for the elimination of what the witness has testified in relation with the Attorney, Mr. Poventud, because no agency or authority on the part of Mr. Poventud has been established, to authorize the other party neither for changing any part of the agreement between his client and the other co-heirs in relation with the obligation of the Executor as to

the performance of his duty as to the filing of the notification of death, and because it is completely immaterial, impertinent and does not have any purpose, except to complicate the issue on the basis of subsequent proof of any witness which may come to impeach what the witness has said just now, and does this hearing to be made unnecessary longer" (T. E. p. 352-353; R. 258).

"Mr. Poventud: And why did you rely on what I told you when you knew that I merely was acting as an attorney and not as a party to the contract?" (T. E. 407; R. 258).

The refusal to admit the evidence offered by the executor, under the circumstances of this case, such as the fact that with the knowledge of everyone concerned the executor was leaving for the States the day after the signing of the Compromise Contract to take care of the estate tax matter, is a material error, specially considering that even though the court rejected that evidence, the court ruled that time was of the essence (R. 75-79, 158-159).

The theory as to the nature of time in a contract, is not so very complicated when applied to the facts of this case, where the parties were not contracting for time, and the clause of the contract, under which this question of time arises, reveals patently that time was not the matter for which the parties were contracting (R. 111-112).

However, regardless of the substantive question in regard to the nature of time in a contract, the refusal to admit evidence to establish what "time" meant in Clause 3rd, letter (i) of the Compromise Contract, is an inescapable error. The idea was not to change the contract but to explain the circumstances under which something entirely subsidiary and of comparatively little importance came into being, and to establish estoppel.

In the case of *Wimer* v. *Wagner*, 322 Mo. 156, 20SW (2d) 650, 79 A. L. R. 121, the theory is laid down that where time is stated and it does not appear whether it is of the essence, the intention of the parties manifested by the agreement as a whole in view of the surrounding facts, determines the nature of time in that contract. Then parole evidence is admissible to show such intention, unless contradictory to the written terms of the contract. Our case is the typical case where the nature of time as well as the waiving of same, may be established by parole evidence, the circumstances being such that the admission of parole evidence seems very useful to the administration of justice.

In the case of *Johnson* v. *Schuchardt* (Mo. 1933), 89 A. L. R. 914, the doctrine is laid down that when a contract does not expressly provide that time shall be of the essence, the court will look to the language employed and to the nature and purposes of the contract, and to the circumstances under which it was signed, in order to determine whether the parties intended that time should be of the essence of the contract.

We are not contending that if parties to a contract set a definite time and expressly state that such time is of the essence of the contract, that there is even the possibility of discussing a question like that; we do contend that unless time is made of the essence by the express wording or by clear implication, a question as to "time" arises. It is then that contemporaneous parole or extrinsic evidence to the effect that time was not of the essence of the contract, is admissible.

The case of *Ochoteco* v. *Cordova*, 47 D. P. R. 554, shows the law prevailing in Puerto Rico which is similar to the one prevailing in the United States: "The Court will look always at the true transaction between the parties." In

that case the Supreme Court of Puerto Rico expressed itself as follows:

> "It is generally considered that parole evidence is admissible where it is offered, not for the purpose of varying the terms of a written contract, but for the purpose of explaining and showing the true nature and character of the transaction evidenced thereby, specially where it is plain that the language used, taken in its literal sense, does not exhibit the real transaction, or where the writing is assailed on the ground of fraud" (Ochoteco Jr. *v.* Cordova, 47 D. P. R. 554-562 at p. 559).

Of course, the evidence offered by the executor was admissible from the standpoint of estoppel, for it is clear that he was induced to sign by what Mr. Poventud told him. (See Poventud statement, quoted *ante.*)

In respect to this, the following principles apply:

> "When one person by anything which he does or says, or abstains from doing or saying intentionally causes, or permits another person to believe a thing to be true and to act upon such belief, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing." *Jones on Evidence, Vol. 1, page 516, fourth Ed.*
>
> "And covenants contained in an executory sealed contract may be waived by parol by the party for whose benefit they were inserted, providing no new element or terms are added, and the party to the contract so waiving one of the terms of covenants will be estopped from claiming that such covenant was not performed by the other" (Laughlin *v.* Norton, (1914) 187 Ill. App. 257, reversed on another ground in (1915) 267 Ill. 476, 108 N. E. 648. Vease 55 A. L. R. 700-701).

The cases cited above represent the theory of the courts in Puerto Rico and in the United States in regard to this question of evidence, and therefore, we think that we have been able to establish, in regard to it, that there may be, and we believe there is, a fundamental and highly prejudicial error in the holding of the District Court of Ponce which was assigned as error by the appellant in the Supreme Court but which the Supreme Court did not examine for reasons that we do not know. The Circuit also refused to examine this question of local law.

The Supreme Court of Puerto Rico committed obvious error of local law in regard to supplemental objection, Letter (A), and in relation to which the court below ordered the executor to put into the final accounts a chose in action for $45,359.50 against the Partnership Mario Mercado e Hijos.

To begin with, and as shown hereinbefore, under Sec. 1044 of the C. C. of P. R., the Compromise Contract is the law governing the relations of the contracting parties; that means, of course, that a contract is not to be disregarded by the signing parties or added to, and that no action can prosper for that purpose without due process. (This point is covered in Federal Question No. III, page 5 of this petition.)

However, from the standpoint of local law, this question is no less fundamental than from the standpoint of Federal law. To start with, we must remember that the $45,359.50 involved in this supplemental objection, Letter (A), came from the very same banking funds distributed by the Compromise Contract between the partnership and the estate, the majority of which funds were recognized as belonging to the Partnership (Testimony of Mr. Waymouth, T. E. pp. 1427-1448, specially at pp. 1445-1447; R. 262). These banking funds were, therefore, by necessary implication,

involved, treated, analyzed and dealt with in the Compromise Contract (R. 109). This being the case, the lower court, as a matter of local law, and, independently of the Constitutional question, was without power, legally speaking, to add to the inventory a credit against the Partnership, increasing the amount of $413,064.63, which according to that contract was agreed to as being the only debt of the Partnership Mario Mercado e Hijos to the estate (Compromise Contract, R. 101, 108, 122) (*Baltzer* v. *Raleigh, etc. R. R. Co.*, 115 U. S. 634).

Looking at this same question from another standpoint, it is clear from the record and from the judgment of the Court below that this fund never came into the hands of the executor. If it did not, he cannot be charged with any responsibility to answer for it; much less if, when he is called to answer, he is met by the simultaneous contention that he is not the executor any more (*Mercado* v. *Corte*, 62 D. P. R. 368). We see no excuse for a creditor, Adrian Mercado Riera, to sue the co-owner of the credit, Mario Mercado Riera, so as to establish that a debtor, Partnership Mario Mercado e Hijos, owes them a debt, in this case, $45,359.50; for it is clear that the law provides a way whereby the objectors in this case, if they think that Partnership Mario Mercado e Hijos owes them something, may sue Partnership Mario Mercado e Hijos for their share of the debt. As a matter of fact, we do not know of any other valid and legal way of claiming a debt under the law. In relation to this question, we quote from the appearance of the parties in the Compromise Contract, wherein it is stated that Partnership Mario Mercado e Hijos appears *"in so far as such partnership is affected by this document or with respect to any undertaking or obligation of said partnership"* (Compromise Contract, R. 95). The contract sets the credit of the estate against

the partnership Mario Mercado e Hijos in the sum of $413,064.63. Any attempt to change that obligation is an attempt to change the law of the contract, and as a matter of local law, it cannot be done in these proceedings, as well as a matter of Constitutional law. Besides, probate proceedings are not the proper proceedings to discuss and settle title to property as between the estate and a third party claimant, as shown by the following citations:

Lopez v. *Narvaez*, 55 D. P. R. 214.

> "The court correctly refused to direct the executor of the estate of Francesco Inghilleri, deceased, to include in the inventory as the property of the estate the trust fund. The probate court was without jurisdiction to try the title to that property. *In re* Estate and Guardianship of Vucinish, a Minor, 3 Cal. (2d) 235, 243, 44 P. (2d) 567; McPile *v.* Superior Court, 220 Cal. 254, 30 P. (2d) 17; Ex Parte Casey, 71 Cal. 269, 12 P. 118; Ila Cal. Jur. 94, Sec. 41."

In re Inghilleri's Estate, 81 P. (2d) 268, 27 Cal. App. (2d) 664.
Bauer v. *Bauer*, 201 Cal. 267, 256 Pac. 820.
Estate of Klumpe, 167 Cal. 415.
Estate of Wenks, 171 Cal. 607, 154 Pac. 24.

All the cases cited above proceed under the theory that when the title to property is in a third person, as in this case, that title to property cannot be discussed and settled in probated proceedings, the court having no jurisdiction as the third party is not in privity; that is, he is not before the court.

The same problem of local law, arising in regard to the credit of $45,359.50 (Supplemental Objection, Letter (A)), arises in regard to the credit of $15,535.70, involved in Supplemental Objection, Letter (B) (R. 54).

The reason given by the Supreme Court to sustain the order of the District Court with a certain modification is that, at the time of the death of the testator, the Partnership was owing the estate the sum of $428,600.33. The Court refers then to a payment made by the Partnership for testator's income tax after the testator's death in the amount of $15,535.70 (R. 169). This $15,535.70 payment represents the difference between the $428,600.33 debt at the time of the testator's death and the amount of $413,-064.63 agreed to in the Compromise Contract (Peralta's Testimony R. pp. 138A-138E; R. 264).

Therefore, the judgment and opinion of the Supreme Court merely supports our contention that the decision of both Courts below is utterly devoid of legal justification.

The explanation of the movement of the debit account given by the Court (R. 169), the testimony of Peralta and that of Mr. Waymouth, (R. 1428-1429, R. 264), merely establishes the reasons behind, or serving as basis for, the Compromise Contract between the Partnership and the estate. So the Court below, when deciding, had before it (1) the agreement of September 9, 1938 between the Partnership and the estate fixing the debt at $413,064.63, and (2) a clear and precise explanation of the reasons for the agreement.

Where is the legal justification then for the issuing of a judgment interfering with the agreement, adding to or modifying it in any way?

> "(C. C. P. of P. R., Sec. 388) (1858 Cal.) In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

"g. A contract cannot be made for the parties by the Court; it can only enforce an existing one, Imperial F. Ins. Co. *v.* Coos County, 151 U. S. 452.

The District Court and the Supreme Court below committed patent and inescapable error of local law in the interpretation of the Compromise Contract, Clause 3rd, Letter (D) when deciding that the Estate was not bound to pay the Inheritance Tax on the $320.306.53 (Impeachment XII (B), which under said Contract of Compromise was to enter in full and be an asset of the Partnership).

To begin with, the payment of the tax on any inheritance is a legal obligation of the heirs under the law (Inheritance Tax Law of Puerto Rico, Revised Statutes of P. R. 1941, pp. 1176-1177, Sections 2, 9 and 10.) The question, therefore, is under what theory can the objectors be released of that legal obligation in this case?

An examination of the Compromise Contract reveals that this Contract was not signed by the Treasurer of Puerto Rico (R. 94), which means that it was not obligatory upon the Treasurer. So it had no effect upon the Treasurer any agreement as between the heirs to enter in full $320,306-.53 from the banking funds of decedent into the assets of the Partnership. This transfer of money from the estate to the Partnership was a private affair of the signers.

It is true that the Contract provides that the heirs acknowledged the fund transferred to be of the exclusive and sole property of Partnership Mario Mercado e Hijos and to have been so, but it must be remembered that this is a Compromise Contract and in this type of contract language is many times used to suit particular circumstances and purposes.

In any way, if the Executor is to be called to answer in regard to this disbursement, this must appear justified by the facts in the case, or else the placing of responsibility in the executor would be unfounded. And, what were the

acts of the executor in regard to this impeachment? The record shows that the money entered in full under the Compromise Contract as an asset of the Partnership, was in banks in the name of the testator at the time of his death (R. 109). Therefore, it was presumptively an asset of the estate for inheritance tax purposes.

In regard to the notification of death, the Contract provided that the executor was to remit said notification of death to the Treasury within ten days from the signing of the Contract (R. 111-112). The Contract cannot be legally understood, and as a matter of fact it does not so provide, that the executor was to conceal from the Treasurer of Puerto Rico the fact that at the death of the testator, $576,306.53 was in the testator's name in the banks, because if the Contract were to be understood in that way, it would be a void contract as one requiring of a quasi-public official the commission of an illegal act (Art. 1207, Civil Code of Puerto Rico.)

So, the executor, in regard to the banking funds, informed the Treasury as follows:

"Notification of Death. (D.P. p. 105)

Part of money in banks		$256,000.00
In the National City Bank, Ponce Branch	$201,871.02	
In the National City Bank, principal office at New York, N. Y.	200,084.95	
In the "Banco de Ponce", Ponce, Puerto Rico	174,350.56	
Total of deposits	$576,306.53	

(Note): The $320,306.53 which is the rest of this money, as owned by the decedent by the date of his death, shall pass without deductions, to the Partnership

Mario Mercado e Hijos, to form the reserve fund of said Partnership". (R. 267)

The information given as shown above to the Treasurer conforms strictly to the Compromise Contract. The executor, when giving it, did not add the $320,306.53 to the gross estate. He simply informed the Treasurer of the amount in banks at the death of the testator and the amount of that money recognized and acknowledged as passing to be an asset of Partnership Mario Mercado e Hijos. The Treasurer refused to accept the amount of $320,306.53 as a deduction to the estate and he himself added that amount to the gross estate. Then, acting under Section 7 of the Inheritance Tax Law of Puerto Rico, which provides as follows:

> "Section 7. Within thirty days after the computation of said appraisal and assessment of taxes, any person or beneficiary affected thereby may appeal therefrom to the Board of Review and Equalization" (Laws of Puerto Rico, 1936, p. 372).

notified all the interested parties of the assessment. (T. E., Testimony of Mr. Francisco Julia, pp. 1211-1213; 1186. R. 268.)

None of the heirs took appeal against this decision of the Treasurer.

But that is not the most important aspect in relating to this impeachment:

After the Treasurer assessed the tax rejecting the $320,-306.53 deduction made by the executor, attorneys Poventud and Iriarte visited the Treasury in the name of the objectors (T.E. 1153-1156 and subsequent pages; R. 268). They discussed the assessment; did not object in the least to the inclusion of the $320,306.53 made by the Treasury, reached an understanding with the Department and caused the Department to call attorney Ochoteco of the executor to ap-

prove the understanding (T.E. 1155-1156, R. 268); and the facts are that they accepted the inclusion by the Treasurer of the $320,306.53 in every respect and objected only to other items of minor importance; the testimony proving, beyond doubt, that the objectors assented to the assessment and were proud that they secured a decreased valuation in some items, amounting to $49,166.70 (T.E. 1156; R. 268). A reading of Mr. Francisco Julia's testimony will reveal astonishing facts in regard to the conduct of the objectors (T.E. 1153-1214; R. 268).

Therefore, looking at this matter from the standpoint of local law, the Courts below are without support in the facts and the law of this case to sustain their decision. The executor committed no reproachable act by telling the facts to the Treasury; he did not add the $320,306.53 to the estate, and as the objectors did not take an appeal but, on the contrary, consented, nothing could have been done under the Compromise Contract but to pay the tax as assessed and consented to by all the interested parties.

The other errors of local law will be discussed in the brief to be filed if this writ of certiorari is granted as we expect.

We believe all of these fundamentals and see no reason for the action of the Circuit Court in refusing to hear this appeal.

WHEREFORE, it is respectfully prayed that this Petition for Writ of Certiorari or Mandamus be granted.

In Washington, D. C., this — day of July, 1948.

Respectfully submitted,

BENJAMIN ORTIZ,
CHARLES CUPRILL OPPENHEIMER,
AND PEDRO M. PORRATA,
By PEDRO M. PORRATA,
Attorneys for Petitioner.

INDEX TO APPENDIX

APPENDIX I

CONSTITUTION AND STATUTES

CONSTITUTION

Article III. Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article IV. Section 3; Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Fifth Amendment. No person • • • nor be deprived of life, liberty, or property, without due process of law.

FEDERAL

Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat., 951.

Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property, without due process of law, or deny to any person therein, the equal protection of the laws.

Judicial Code, Sec. 128 (a). The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts • • •

Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000.00, and in all habeas corpus proceedings. (As amended by Act of February 13, 1925, c. 229, 43 Stat. 936.)

APPENDIX II

EXHIBIT 44 OF THE EXECUTOR—LETTER

Treasury Department
Internal Revenue Service
Baltimore, Md.

Office of the Collector, District of Maryland.
In reply refer to MT: ET- RDM

July 28, 1938.

Mr. Pedro M. Porrata, Abogado y Notario, Apartado 1224,
Ponce, Puerto Rico.

DEAR SIR:

Receipt is hereby acknowledged of your letter of July 23, 1938. and in answer to the inquiry which it contained, please be advised that under Art. 5 of Regulation 80, "Every person born or naturalized in the United States, (including citizens and residents of possessions of the United States, who have been made citizens of the United States by treaty or Act of Congress), who owes his allegiance to or is entitled to the protection of the United States, is a citizen thereof.

It would appear from the above that the decedent was a citizen within the meaning of the Act, and we would accordingly advise the filing of the Preliminary Notice, Form 704, in duplicate, the same to be forwarded to this office within sixty days after the date of the decedent's death. The Federal Estate Tax Return on Form 706, also in duplicate, should be filed within fifteen months after the date of the decedent's death.

In case sixty days have expired since the decedent's death, the Preliminary Notice, Form 704, should be accompanied by an affidavit, stating the cause of delay in the filing, which would be forwarded to the Commissioner of Internal Revenue, at Washington, D. C.

Enclosed herewith you will find Forms 704 and 706, also a copy of Regulation #80.

Respectfully,

(Sgd.) P. M. SIEMERS,
Deputy Collector in Charge. M.

M.E.

APPENDIX III

January 26, 1939
VFS

Commissioner of Internal Revenue
Treasury Department
Washington, D. C.

RE: ESTATE TAX

Dear Sir:

The late Mario Mercado Montalvo, who died in August, 1937, a citizen and resident of Puerto Rico, had a substantial sum of money on deposit with us at the time of his death. Before turning the money over to his executor, appointed in Puerto Rico, we asked that State and Federal estate tax waivers be furnished to us. This was done as part of our regular routine in the case of non-resident decedents, for whom no executor or administrator has been appointed in the United States, in order to make sure that no claim for estate taxes on the ground that the decedent was doing business here would be made against us.

We now understand from the executor that, while no claim is made that the decedent was engaged in business in this country, the issuance of a Federal waiver has been delayed pending a determination of the question whether the estate is subject to Federal estate tax, as being the estate of a citizen of the United States. The executor has suggested that, in any event, the money should be turned over to him at our branch in Puerto Rico, on the ground that, if the estate is treated as the estate of a citizen, the executor is responsible for the payment of the tax and is entitled to receive the money, without a waiver, while if the estate is treated as the estate of a non-resident alien decedent, there would clearly be no tax liability on the bank deposit and no reason for our retaining it.

We referred the matter to our counsel, Messrs. Shearman & Sterling; and we enclose herewith a copy of their opinion. We understand that, as stated in counsel's opinion, the executor does not wish to press the claim that the

money be paid over to him in Puerto Rico, without your consent. He is anxious, however to have some immediate disposition of the matter; and we trust that you will advise us promptly whether you consent to the payment of the money to him in Puerto Rico.

Yours very truly,

(Fdo) V. E. SCHROETER,
Assistant Cashier.

(Seal on back that says: "Signature Control Dept. 1939 Jan. 28, P. M. 12 46—The National City Bank of New York."

APPENDIX IV

Cable address, "RUMLATUS"

Shearman & Sterling

55 Wall Street

New York

Guy Cary, Gerrard Winston, Phillip A. Carroll, Chauncey B. Carver, Cortland Betts, Carl A. Head, Harry W. Forbes, Frederic N. Gilbert, Frederick W. Jackson, Walter K. Earle, Joseph F. Dempsey, Sanford H. H. Freund, Wm. Weart Lancaster, Deering Howe, Joseph W. Drake, George W. Sheldon, Walter Frankling Pease, Clifford M. Bowden, Robert Nies West

January 26, 1939.

The National City Bank of New York,
55 Wall Street
New York, New York

DEAR SIRS:

Replying to your inquiry regarding the liability of the estate of the late Mario Mercado Montalvo to Federal estate tax and the claim made by his executor that the money on deposit with you to the credit of the decedent should be placed to the credit of the executor in your branch in Puerto Rico, we understand the facts to be as follows:

The decedent was a citizen and resident of Puerto Rico. He was not engaged in business in the United States; and the question whether the money on deposit with you was subject to Federal estate tax consequently depends upon whether his estate should be taxed as the estate of a citizen of the United States, or as the estate of a non-resident not a citizen. If taxed as the estate of a citizen, the entire estate, including the money on deposit, would be subject to the tax; if taxed as the estate of a non-resident non-citizen, the tax would apply only to property in the United States and the money on deposit would be expressly exempt, under the statutory provision that such deposits should not be deemed property within the United States, for the purpose of the tax.

The question depends entirely upon the construction to be given to the amendments to the statute imposing the estate tax, made by the Revenue Act of 1934. Prior to that Act, estate tax liability depend upon the residence of the decedent, estates of non-resident decedents being taxed only on property within the United States, whether the decedent was a citizen of the United States or not. The Revenue Act of 1934 amended the statute so as to make the tax apply to the entire estate "of a citizen or resident of the United States", while limiting the tax to property in the United States in the case of "a non-resident not a citizen of the United States." Both in that Act and in prior and subsequent Acts, the term "United States," when used in a geographical sense, was defined to include only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Citizens of Puerto Rico were made citizens of the United States by the Jones Act of March 2, 1917; and the Treasury Department has apparently construed the 1934 amendments as subjecting the estates of deceased residents of Puerto Rico to full estate tax, like the estates of resident citizens. That construction appears in the following sentence from Article 5 of the present estate tax Regulations, in the parenthetical clause italicized below:

> "Every person born or naturalized in the United States (*including citizens and residents of possessions*

of the United States who have been made citizens of the United States by treaty or Act of Congress) is a citizen thereof."

In our opinion, that construction of the statute, as expressed in the parenthetical clause above, is unwarranted and incorrect. The 1934 amendments use only the phrases, "citizen or resident of the United States" and "non-resident not a citizen of the United States." In these phrases, the term "United States" is clearly used in the geographical sense (i.e., limited to the States, the Territories of Alaska and Hawaii, and the District of Columbia), so far as residence is concerned. That is conceded in the same Article 5, in the statement that "A citizen of the United States is a non-resident if his domicile is in Puerto Rico . . .". It does not seem to us that the term "United States" can properly be given any broader or different meaning in connection with the use of the word "citizen" in these phrases than in connection with the word "resident."

In other words, a citizen of Puerto Rico is not a citizen or resident of the United States (in its geographical sense), but is a non-resident not a citizen of the United States (in its geographical sense). That distinction between citizens of possessions of the United States, "not otherwise citizens of the United States", has been made in the statutes for income tax purposes since the Revenue Act of 1924 (Sec. 260; Sec. 252 of the 1928 Act and Subsequent Acts); and a consideration of the purpose and effect of the amendments negatives any claim that a citizen of Puerto Rico, not otherwise a citizen of the United States, should be considered a citizen of the United States, for estate tax purposes.

The expressed purpose of the amendments, as stated in the Committee Reports on the Bill, was to place citizens of the United States, living abroad, on the same footing as resident citizens for estate tax purposes, so that the status of both resident and non-resident citizens should be the same, for estate tax, gift tax and income tax purposes. For income tax purposes, the status of residents of Puerto Rico is not that of citizens of the United States, but of non-resident aliens, taxable only on income from sources in the United States; and it is hardly conceivable that Congress,

while treating them like non-resident aliens for income tax purposes, intended by the 1934 amendments to treat them as citizens for estate tax purposes and to collect estate tax on their entire estates, regardless of whether they had any property in the United States or not. Not only was no mention made of Puerto Rico in either the 1934 amendments or the Committee Reports, but Section 301 (c) of the Revenue Act of 1926 (as amended by Sec. 802 of the Revenue Act of 1932), allowing credit for estate and succession taxes actually paid to any "State or Territory or the District of Columbia", was not amended to allow a similar credit for taxes paid to Puerto Rico, as undoubtedly would have been done if Congress had intended the tax to apply to Puerto Rico.

In addition, the organic law of Puerto Rico, in providing that Federal statutes not locally inapplicable should apply to Puerto Rico, expressly excepted "internal-revenue laws"; and we believe that it has been the uniform policy of Congress scrupulously to refrain from attempting to collect taxes in Puerto Rico for the benefit of the Federal Government, and to insert specific provisions in fiscal statutes intended to operate in Puerto Rico.

We have examined the very able brief submitted on behalf of the estate by Mr. Porrata, which deals fully with the various authorities on the status of citizens of Puerto Rico and the limited nature of the citizenship conferred upon them by the Jones Act. We do not think it can reasonably be argued that, because of such limited citizenship conferred by the Jones Act many years before, citizens of Puerto Rico should be deemed citizens of the United States for estate tax purposes within the meaning of the 1934 amendments. Nothing in the language of the amendments or in the Committee Reports even suggests that Congress intended to make any such revolutionary change, involving "taxation without representation", in its time-honored policy of dealing with Puerto Rico, or to discriminate against Puerto Ricans by imposing a tax, the injustice of which would be obvious and which would directly destroy the uniformity in imposing income and estate taxes, which was one of the expressed purposes of the amendments.

Nevertheless, as matters now stand, the Bank is bound to observe Article 5 of the Regulations as holding that the entire estate of the decedent was subject to estate tax. That presents the second question as to whether, assuming that the entire estate is subject to tax as the estate of a citizen, the Bank would be justified in turning over the money to the executor in Puerto Rico. The demand made by the executor that the money should be turned over to him there seems entirely logical; for if the estate is taxable only as the estate of a non-resident non-citizen, the bank deposit is clearly exempt from tax, and if the estate is taxable as the estate of a citizen, the executor is liable for the tax and, presumably, the Government can and should collect the tax directly from him. Since, however, the matter has been submitted to the Treasury Department and a waiver asked for, which is now under consideration by the Treasury Department, we do not think that the bank ought to transfer the money at the present time, without notifying the Treasury Department and obtaining the Treasury Department's consent. We have been assured by the executor and his counsel that they have no desire to interfere with the orderly determination of the question by the Treasury Department, nor to seek to obtain the transfer of the funds without the Treasury Department's consent.

We suggest, therefore, that you submit the matter at once to the Commissioner of Internal Revenue, sending him a copy of this letter and asking him to consent to your transferring the funds to the executor, as requested.

Yours very truly,

(S.) SHEARMAN & STERLING.

APPENDIX V

TREASURY DEPARTMENT
Washington

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to

MT-ET-42611-ER. Estate of Mario Mercado Montalvo.

February 3, 1939

The National City Bank of New York, New York, New York.

Attention: VES

GENTLEMEN:

Receipt is acknowledged of your letter of January 26, 1939, relative to the above-named estate.

Careful consideration will be given to your communication and you will be further advised relative thereto at the earliest practicable date.

Respectfully,

(S.) D. S. BLISS,
Deputy Commissioner.

(19M (Rev. July, 1938.)

SHEARMAN & STERLING

Date, Feb. 6, 1939.

To: V. E. Schroeter, Asst. Cashier.
From: H. W. Forbes.
Remarks: noted—Thanks—I was in Washington last Thursday and talked with Messrs. Mercado & Porrata there.

HWF

Seal: Read by—Eight—Enclosures. Verified . . . Missing . . .
Seals on the back: Signature Control Dept.—1939, Feb. 6, P. M. 1:03—The National City Bank of New York.

"Night mail—J. Feb. 7, 1939 J.—The National City Bank —New York. Referred to officer."

APPENDIX VI

TREASURY DEPARTMENT
Washington

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to

MT-ET-42611-2d New York, Estate of Mario Mercado Montalvo. Date of Death—August 22, 1937

Feb. 13, 1939.

The National City Bank of New York, New York, New York.

Attention: VES

GENTLEMEN:

Further reference is made to your letter of January 26, 1939, inquiring whether the Bureau will consent to the transfer of certain money on deposit with your bank in the name of the above-named decedent.

You are advised that the question of the liability for Federal estate tax of the estate of the above-named decedent is now before the Chief Counsel of the Bureau of Internal Revenue for decision. In view of this fact you should not release the bank deposit pending further advice from this office in connection with the matter.

Respectfully,

(S.) D. S. BLISS.
Deputy Commissioner.

Seal: Read by—Eight—Enclosures. Verified . . Missing . . . Seals on the back: "Signature Control Dept.—1939, Feb. 14, P. M. 4:52—The National City Bank of New York."

Signature Control Dept.—1939, Feb. 14, A. M. 10:38—The National City Bank of New York, night mail—J. Feb. 14, 1939, J.—The National City Bank of New York. Referred to Tax Department.

APPENDIX VII

TREASURY DEPARTMENT
Washington

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to

MT-ET-MR-42611-2d New York, Estate of Mario Mercado Montalvo. Date of Death—August 22, 1937

Mar. 24, 1939.

The National City Bank of New York, 55 Wall Street, New York, New York.

GENTLEMEN:

Further reference is made to your letter of recent date regarding the issuance of a certificate authorizing the transfer of a deposit in your bank in the name of the above-named decedent.

You are advised it has been determined that the estate of the above-named decedent is not subject to Federal estate tax and a certificate authorizing the transfer of the bank deposit in question was delivered personally to the executor of the estate under recent date.

Respectfully,

(Fdo) D. S. BLISS,
Deputy Commissioner.

Seal: Read by—Eight—Enclosures. Verified . . . Missing . . . Seals on the back: "Signature Control Dept.—1939 Mar. 25, A. M. 8:53—The National City Bank of New York."

"Signature Control Dept.—1939 Mar. 27, A. M. 9:38—The National City Bank of New York." "Night mail—J. Mar. 25, 1939 J.—The National City Bank—New York" "Signature Control Department."

APPENDIX VIII

Mar. 24, 1939.

MR-ET-NR-42611-2d New York, Estate of Mario Mercado Montalvo. Date of Death—August 22, 1937

Mario Mercado Riera, Executor, Post Office Box 987, Ponce, Puerto Rico.

SIR:

Reference is made to the question of the liability of the above-named estate under the Federal estate tax laws. The ruling thereon, of which you were informally advised recently, is hereby confirmed.

Decedent was born on January 19, 1855, and died on August 22, 1937. He was a life long resident of Puerto Rico. Puerto Ricans were made citizens of the United States by an Act of Congress on March 2, 1917 (U. S. C. 1934 Edition, Title 8, Section 5). Under this law, known as the Jones Act, the decedent became a citizen of the United States since he did not elect otherwise, which under the provisions of the law he was entitled to do. At date of death decedent's gross estate, as shown by a copy of an inventory submitted, amounted to $1,338,932.21. This amount included a deposit of $200,000.00 in decedent's name with the National City Bank of New York, 55 Wall Street, New York, New York, an account of $611.40 with the International Banking Corporation, Barcelona, Spain, and an account of $385.76 with the International Banking Corporation, Madrid, Spain. The deposit and accounts did not arise from money earned in the United States. So far as is known all other property of decedent was situated in Puerto Rico at date of death. Decedent was not engaged in business in the United States at the time of his death or at any time prior thereto.

The estate contends that the decedent was not a citizen of the United States within the meaning of the Federal estate tax law and that such law is not applicable to the people of Puerto Rico unless made applicable by express provisions of the Act in view of the expressed will of Congress as embodied in Section 9 of the Organic Law of

Puerto Rico (Jones Act-U. S. C. 1934 Edition, Title 48 Section 734).

After a careful consideration of the question presented, it is the conclusion of the Bureau that the decedent was a non-resident citizen of the United States but his estate is not subject to the provisions of the Federal estate tax law generally applicable to such citizens in view of the specific provisions of the Organic Law of Puerto Rico (Act of March 2, 1917, 39 Stat. 954) which state:

> "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, *except the internal-revenue laws* * * *."

In view of the foregoing a Federal estate tax return, Form 706, is not required to be filed for the above-named estate. A transfer certificate authorizing the transfer of the bank deposit with the National City Bank of New York was delivered to you personally under recent date.

Respectfully,

(Signed) D. S. Bliss,
Deputy Commissioner.

APPENDIX IX

June 13, 1939.

MT-ET-NR-RR-62611-2d New York. Estate of Mario Mercado Montalvo. Date of Death—August 22, 1937

Mario Mercado Riera, Executor, Post Office Box 987, Ponce, Puerto Rico.

Sir:

Reference is made to the question recently before this office as to whether any of the property forming a part of the estate of the above-named decedent was liable for Federal estate tax inasmuch as the decedent was a resident of Puerto

Rico. A ruling was furnished you in connection with this matter under date of March 24, 1939, and on June 9, 1939, Mr. Pedro M. Porrata, attorney, called at this office and requested that another letter be prepared outlining some of the problems involved in making a ruling in the case.

Decedent was born on January 19, 1855, and died on August 22, 1937. He was a life long resident of Puerto Rico. At date of death decedent's gross estate, as shown by a copy of an inventory submitted, amounted to $1,338,932.21. This amount included a deposit of $200,000.00 in decedent's name with the National City Bank of New York, 55 Wall Street, New York, New York, an account of $611.40 with the International Banking Corporation, Barcelona, Spain, and an account of $385.76 with the International Banking Corporation, Madrid, Spain. The deposit and accounts did not arise from money earned in the United States. So far as is known all other property of decedent was situated in Puerto Rico at date of death. Decedent was not engaged in business in the United States at the time of his death or at any time prior thereto.

No specific ruling had ever been made by the Bureau on this question and it was, accordingly, necessary to consider the matter in detail. Under the facts in the case it was possible to arrive at the conclusion that the decedent was a non-resident citizen of the United States or that he was a non-resident alien for the purpose of the Federal estate tax. If it should be held that he was a non-resident citizen of the United States, the further problem was presented as to whether there should be included in the gross estate (1) all of the personal property of the decedent wherever situated, (2) all of the personal property situated outside of Puerto Rico, or (3) none of the property regardless of where situated. If it should be held that the decedent was a non-resident alien, there could be included in the gross estate only such property having a situs in the United States other than cash on deposit and any amount receivable as insurance upon the life of the decedent. The question involved was an important one and after receiving careful and extended consideration in this office, was referred to the Chief Counsel of the Bureau for a specific ruling. The ruling of the Chief Counsel was to the effect that while the decedent

was a non-resident citizen of the United States, the Federal estate tax law generally applicable to such citizens did not apply to residents of Puerto Rico in view of the specific provisions of the Organic Act of Puerto Rico which state:

> "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the *internal-revenue laws* * * *."

In view of the foregoing it was held that an estate tax return, Form 706, was not required to be filed for the above-named decedent.

Respectfully,

(Signed) D. S. Bliss,
Deputy Commissioner.

RB:ELR.

APPENDIX X

(Seal)

UNITED STATES OF AMERICA, TREASURY DEPARTMENT, WASHINGTON

Nov. 14, 1940.
19—.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of a copy of the United States Treasury Department, Internal Revenue, transfer certificate, with attached copies of letters dated March 24, 1939, and June 13, 1939, submitted in connection with the estate of Mario Mercado Montalvo, date of death August 22, 1937, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

(Signed) F. A. BIRGFELD,
Chief Clerk,
Treasury Department.

UNITED STATES TREASURY DEPARTMENT,
INTERNAL REVENUE

Transfer Certificate

Estate of Mario Mercado Montalvo. Date of Death: August 22, 1937

Residence at Time of Death: ——. MT-ET-42611—2d New York

By direction of the Commissioner of Internal Revenue, and in accordance with the provisions of the internal revenue laws and regulations, I do hereby certify that the estate tax, if any, with respect to the above-named estate has been fully discharged or duly provided for, and therefore, the following described property may be transferred without liability under the Federal estate tax law and regulations:

Bank deposit—$200,000.00.

(Fdo) D. S. BLISS,
Deputy Commissioner.

Washington, D. C. * * *. RB:ELR. 1112M REV. Sept. 1933

STATE OF NEW YORK, DEPARTMENT OF TAXATION AND FINANCE, ALBANY

October 17, 1938.

Transfer Tax Bureau, Treasurer National City Bank.

DEAR SIR:

We hereby consent to the immediate transfer of $200,000.00 and int. now on deposit in the above mentioned bank to the credit of Mario Mercado Montalvo late of Puerto Rico deceased, and waive notice of such transfer.

Respectfully yours,

STATE TAX COMMISSION,
(Fdo) W. E. STEPHENS,
Deputy Tax Commissioner.

AMC.

(7613)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 180

MARIO MERCADO RIERA, Accounting as Executor of the Estate of Mario Mercado Montalvo,

Petitioner,

V.

ADRIAN MERCADO RIERA and MARIA LUISA MERCADO RIERA DE BELAVAL,

Respondents.

MEMORANDUM ANSWERING RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, FOR THE ISSUANCE OF A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF APPEALS.

BENJAMIN ORTIZ,
CHARLES CUPRILL OPPENHEIMER,
PEDRO M. PORRATA,
Attorneys for Petitioner.

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IN THE

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Petitioner,

V.

ADRIAN MERCADO RIERA and MARIA LUISA MERCADO RIERA DE BELAVAL,

Respondents.

MEMORANDUM ANSWERING RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI OR, IN THE ALTERNATIVE, FOR THE ISSUANCE OF A WRIT OF MANDAMUS TO THE CIRCUIT COURT OF APPEALS.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

In view of Respondents' brief raising new and unexpected questions of jurisdiction, Petitioner is being forced to rely on the mercy of this Court to allow and consider this Reply Memorandum.

I

Legal Situation as Presented by Both Petitioner and Respondents.

I—The petition in this case was filed in July 1948. It shows the presence of the following federal and local questions of law:

First: Questions of the interpretation of the Federal Estate Tax Law and the regulations of the Internal Revenue Bureau of the United States in relation to the taxability of the estates of United States citizens from Puerto Rico (Pet. Br. 3-4 and 26-34).

Second: Questions of due process, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sec. 2 of the Organic Law of Puerto Rico, 48 USCA 737 (Pet. Br. 5-6 and 34-46).

Third: Meritorious and important questions of local law, requiring examination by the Circuit Court and by this Court under *De Castro* v. *Board of Commissioners,* 322 U. S. 451; also *Hijos* v. *Commins,* 322 U. S. 465 (Pet. Br. 7-11 and 54-74).

II—The brief in opposition to the petition for certiorari or writ of mandamus which was filed by Respondents, presents substantially the following questions for us now:

First: Petitioner's capacity to file these proceedings as Mercado Riera, accounting-executor.

Second: Denies the presence in this case of federal questions, statutory or constitutional.

Third: Treats the question of local law, as not requiring, under rule 39 (b), review by the Circuit Court of Appeals, or by this Court.

Fourth: Raises other questions of technical but of minor importance which shall be succinctly answered by us now.

II

Our Original Contentions: The Presence in This Case of Federal Questions of Law, Statutory and Constitutional Is Patent.

The questions of federal law, statutory and constitutional, actual and present in these proceedings, and discussed in our petition and brief, are palpable. Respondents' efforts to deny them are futile.

1. Over 600 pages of the record point to the presence and significance of *the federal estate tax question* (Pet. Br. 3 and 26). This question is a paramount one, from both the economic and legal point of view. (Mercado's and Porrata's Testimony T. E. 432-527; 558-961; Ruiz Nazario's Testimony, T. E. 1358-1833, 1749 (A)-1830, and Acosta Velarde's Testimony, T. E. 1471 (A)-1516 (A); D. P. 160-311, 431-433, 458-486, etc.) (Pet. Br. 3 and 26.)

2. The constitutional questions are no less patent. As shown by the deliberate non-joining of parties (partnership and Porrata, for example) who, as signers, are economically interested in the Compromise Contract, Respondents intentionally procured the adjudication of rights arising under that contract *without due process*. The interest, indispensability and necessity of joining these excluded signing parties, is suggested, and even conclusively deter-

mined, by the bare and poignant fact that they contracted with the objectors, Respondents herein, in matters of significant economic value in said Compromise Contract (Pr. Rec. 94-124). Said contracting parties cannot now be skirted or shoved away by any accommodating or self-serving explanation that the interpretation of and adjudications under the Compromise Contract were obtained in testamentary proceedings. Why?: because, among other reasons, in testamentary proceedings the Compromise Contract was agreed to and signed by the parties to it including the Partnership and Porrata; *which signing parties mutually admitted thereby the undeniable corresponding interest of all the other signers.* (Comp. Cont., Pr. Rec. 94, *et seq.*; see also Pet. Br. pp. 5, 6, 34 and 46 where this question of due process is discussed.)

3. The Petition and Brief, pages 7-11 and 54-74, show the nature of the questions of local law present here. These questions concern substantial sums of money and they are of those which, under the *De Castro* case impose upon the Circuit Court of Appeals and upon this Supreme Court, *the delicate task of examining and appraising the Puerto Rico law in its setting.* 322 U. S. 458.

4. The short opinion of the Circuit Court, enthusiastically cited by Respondents in their brief, pp. 6-7, does not constitute or show the examination required in the *De Castro* case by this Court *or any appraisal whatsoever of the local law in its setting.* It is this examination and appraisal, revealed by an analysis of facts and law, that give to the legal profession the satisfaction that the case has been duly considered by the adjudicating tribunal. A denial of a full hearing in this case, and of the benefits of an opinion containing an analysis of facts and law, was in our judgment, and with due respect to contrary understanding, tantamount

to a denial of the right to appeal which Congress granted to Puerto Rican litigants, for reasons pertinent to the powers granted to said body by Article IV of the United States Constitution, 28 USCA Sec. 225, p. 295, 4th, and, as stated in said *De Castro* case, it is only in very exceptional cases that summary dismissals or affirmance are proper. The function of appraising the local law in its setting is a *"delicate task"*, this Supreme Court said, which *"ordinarily cannot be performed summarily"*, 332 U. S. 458. (Italics ours.)

III

Question of Petitioner's Capacity.

Let us answer now the question of the capacity of Mercado Riera to act in these proceedings as accounting-executor.

A—To begin with, the objections to the final accounts of the executor, filed by Respondents themselves on March 16, 1940 (Pr. Rec. 26-36), proceeded against Mercado Riera *as executor*. The objections were filed under the Compromise Contract (Pr. Rec. 35 m.) and according to Sec. 588 *et seq.* of the P. R. C. of C. P. Furthermore, the judgments of both Puerto Rico courts surcharged Mercado Riera *as executor*. (Pr. Rec. 88-92 and 193-196.)

And the prayer attached to Respondents' objections contains such procurements as that the Court dispose of the case by "entering a final order rejecting the impeached items *charging same to the executor*" etc. (Italics ours) (Pr. Rec. 35 b.). These objections, it is important to notice, were filed by Respondents, long after the alleged cessation of the executor activities, which, it is claimed, occurred in September 1939.

Moreover, the objectors filed the objections to the executor accounts, wherein: in proceedings No. 782 of the District Court of Ponce, entitled "Mario Mercado Riera, executor, Letters Testamentary" (Objections, Ty. Rec. J. R. 18). Respondents thereby took advantage of the summary proceedings provided by the Puerto Rico Code of Civil Procedure only for the settlement of accounts of persons accounting as executors. (P. R. C. of C. P., Sec. 588, *et seq.*).

Summarizing, the objection to the final accounts (Pr. Rec. 26-36), the summary proceedings of which the objectors took advantage in this case, the judgment of both, the District and Supreme Court of Puerto Rico, and everything represented in the record, reveals that this was a proceeding against Mercado Riera as accounting-executor under the Compromise Contract *and that he is entitled to defend himself in the character in which he was sued.*

B—However, the pertinent provisions of the Code of Civil Procedure of Puerto Rico support our theory that Petitioner, surcharged as accounting-executor, may appeal and identify himself with the character in which his accounts were surcharged.

Sec. 588, *et seq.* of the P. R. C. of C. P. proves our contention. It provides:

> "Whenever the administrator or executor . . . *for any reason ceases to be such administrator or executor he shall file with the court a final account.*" (Italics ours.)

Consequently, the accounting functions of an executor start under the Puerto Rico Code *when the executor ceases in his ordinary functions as executor.* And then the Code provides, Sec. 590:

"The District Court shall make a final order approving the account as rendered or modifying and amending it, *and charging the executor or administrator* as the law may require, *and an appeal may be taken from such final order.*" (Italics ours.)

Under the Code provisions cited *ante*, the executor retains his position for the purposes of accounting until his case is finally settled and he is discharged according to law. And the law provides that he is to be charged as executor and can appeal from the final order as such even though he ceases in his ordinary activities.

The situation is eloquently illustrated by the following citation from the case of *Boerman* v. *Heirs of Boerman*, 52 P. R. R. 593:

"The order terminating the judicial administration puts an end to the administrator's activities, *but it is the order approving the final account that finally relieves him or her of responsibility.*" (Italics ours.)

C—The situation in Puerto Rico is the same as illustrated in the Minnesota case of *Clover* v. *Peterson* (Minn.) 104 A. L. R. 1188, and the California case of the *Estate of McPhee*, 154 Cal. 385.

In *Clover* v. *Peterson*, a leading case in our jurisprudence, the doctrine may be summarized as follows:

". . . *If others may so attack him in his representative capacity*, why may he not *in the same capacity* resist the attack? When attacked in one capacity, *why must he defend in another?* . . . When his official conduct is condemned, the reaction necessarily reaches his personal interest. *But the fact remains that it is his official conduct that is condemned. Obviously then the*

official is 'aggrieved' notwithstanding the result as to the person who happens to be the official. See *Johnson* v. *Lundgren,* 194 Minn. 300, 260 N. W. 295."

" . . . *Impractical and unjust* would be a rule compelling representatives always to defend their official conduct and their official record thereof solely as to individuals." (Italics ours.)

See also 33 C. J. S., Ex. and Adm., Sec. 79a:

"Ordinarily an executor or administrator is not entitled to a final discharge *until after full settlement of the estate.*

"The court has no legal authority to discharge the executor or administrator, pending a complete settlement of the estate, except as the statute may have permitted, *and the usual rule is that a representative is not entitled to his final discharge until after full settlement of the estate,* including final payment and delivery of all the property by way of distribution to those entitled to the balance, *and the rendering and approval of his final accounts.* When, however, an executor or administrator has fully performed all of his duties, he is entitled to be discharged from the trust." (Italics ours.)

And, in California, even the revocation of Letters Testamentary (which did not happen in our case), does not affect the accounting-executor's right to appeal in the character in which his accounts are surcharged. This appears plainly and emphatically from the opinion in the case of *Estate of McPhee,* 154 Cal. 385, 392, quoted below.

"It appears that subsequent to the order settling his accounts the superior court revoked the letters of

administration of appellant. Thereafter, he appealed from the order of settlement. *Respondent insists that appellant had no right to appeal as administrator after the revocation of his letters. This point has no force. The statute confers on the administrator as such the right of appeal from an order settling his accounts and the right to do so cannot be affected by any order revoking his letters.* (*Ours: See Section 590 of the Puerto Rico Procedural Code to the very same effect.*) The cases of *Kerns* v. *Dean,* 77 Cal. 555 (19 Pac. 817), Ex parte McDermott, 127 Cal. 450 (59 Pac. 783), and Estate of Danielson, 88 Cal. 480 (26 Pac. 505), cited to sustain the position of respondent are entirely inapplicable. *This is so apparent that it would be time ill-spent to particularly point it out.*" (Italics ours.)

Our code of Civil Procedure follows that of California (Op. on Recon. Pr. Rec. 198).

In our case there was no revocation of Letters Testamentary. *Mercado* v. *Mercado,* 152 Fed. (2d) 86, interpreted a clause in the testator's will, which clause extended "the term of one year provided by law to all the time that may be necessary for [the] execution of the trust" (Pr. Rec. 128). Said case came to the Circuit from the Supreme Court of Puerto Rico; which Court held that the extension provided in the will, though amply conceived, under the Civil Code, meant only one year.

There was, therefore, a cessation *de jure* of activities because of the interpretation that time had lapsed. However, it should be noted, that, later in the opinion on reconsideration in this case (Pr. Rec. 198), the Supreme Court of Puerto Rico was then confronted with the proposition that the Law for Special Legal Proceedings, *of more recent enactment than the Civil Code,* superseded all laws in con-

flict therewith (Pr. Rec. 201).[1] The terms for the fulfillment of the executor's function under the Puerto Rico Law of Special Legal Proceedings, is until the accounts are finally liquidated by a final decree of the Court, *the same situation as generally prevails in the United States.*

D—But there is another significant fact to be observed. In his appeal from the District Court of Ponce to the Supreme Court of Puerto Rico, the accounting-executor concocted the appeal in the following language:

> "Now come the executor Mario Mercado Riera, who rendered the accounts the subject of these proceedings No. 782, in the matter of the objection to the final accounts of the executorship . . ." (Pr. Rec. 92-93).

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1 It was also stated in *Mercado* v. *District Court, supra, that in the absence of any new statute it cannot be maintained that the substantive provisions of our Civil Code regarding the appointment and duties of the executor and the term of the executorship may be considered as changed or modified as to their scope as substantive law by the procedural provisions of the Special Legal Proceedings Law.* To this effect we must keep in mind the provisions of §619 of the Code of Civil Procedure (Section 85 of the Special Legal Proceedings Law) which reads as follows:

> "This Act shall take effect from and after its passage, and *all previous laws in conflict herewith are hereby repealed;* but the special proceedings established in the Civil Code, in the mortgage law and its regulations, and in any other law, in so far as not provided for by this Act, remain in force."

We know of no constitutional provision which precludes the Legislature *from enlarging or changing by an adjective law* the provisions contained in the Civil Code on the same matter, *and there is no legal reason whatsoever which precludes the repeal of a provision of the Civil Code by a subsequent procedural law.* Since §586 of the Code of Civil Procedure was approved after §882 of the Revised Civil Code, said section was partially repealed insofar as it establishes that the office of executor is gratuitous. (Italics ours.) (Pr. Rec. 201).

And Respondents also appealed on March 2, 1942, notifying Francisco Parra Capo *as attorney for the executor* (App. Rec. before the Circuit Court of Appeals, p. 45 b.).

No question was raised before the Supreme Court in regard to the capacity of Mercado Riera to appeal as accounting-executor. If any would have been raised, it would have been frivolous. No question can be raised here now. *Bank of Arizona* v. *Haverty*, 232 U. S. 106 and also 70 L. Ed. 916.

E—Moreover, in view of the fact that the appeal to the Circuit Court was taken by Mercado Riera describing himself as accounting-executor (Pr. Rec. 1-5; Pr. Rec. 6), the Louisiana doctrine does away with baseless technicalities, and is as follows:

Succession of Brand, 170 *La.* 411, 127 So. 885:

> ". . . An administrator may appeal if aggrieved in his individual capacity, even if he describes himself erroneously as administrator."

F—The cases cited by Respondents, without showing in any way how they apply to the facts of our case, in a footnote on page 9 of their brief in opposition, are inapplicable.

Ex-parte Zalduondo, 47 P. R. R. 249, *was not the case of an appeal by an accounting-executor.* From a short reference to a point, not necessary for the decision of the case, it appears that the partitioner (not the executor) *had already performed all his functions.*

In our case, the executor is performing his paramount duty of accounting. The essential facts, therefore, are different; the duties are different; the law and everything

is different in what may concern the facts of that case as compared with the facts of ours.

Slater v. *Thompson,* 225 Fed. 768, is of no application either. Slater was not accounting in that case as executor: he was trying to intervene in a suit in equity in the lower court after he was no longer executor. How could he? Mercado in this case is answering as executor under the Compromise Contract entered into with debtors and creditors of the estate, and he is answering according to Sec. 588 *et seq.* of the P. R. C. of C. P.

Taylor v. *Savage,* 11 L. Ed. 132, cannot be used by Respondents. The doctrine of that case is applicable only when the executor is suing in the name of the estate, and he is removed before the appeal is taken. Said case cannot be even suggested for application to the case of an executor sued to account under a contract and according to the Puerto Rico Civil Procedure Code. The cases applicable then are the *Boerman* case; *Clover* v. *Peterson* and *Estate of McPhee, ante.*

In *Kimball* v. *Kimball,* 43 L. Ed. 932, a petition was filed for letters by Maude Kimball. She claimed to be the widow of E. Kimball. Petition was denied. Ground: that the marriage of Kimball was void. She appealed. During the pendency of her appeal, another will was found and other persons were appointed administrators. Hence, it was decided that, in view of the intervening events, *the appeal had become moot.* Those facts are not even distantly similar to the legal situation of a person accounting as an executor under our P. R. C. of C. P.

Respondents' citations from C. J. S. and C. J. are even less related to our case. For example, 4 C. J. S., App. and Arr., Sec. 182, states the general rule as follows:

> "If a party ceases in his representative capacity, he cannot appeal in that capacity."

The above is the doctrine of *Taylor* v. *Savage, ante.* Our case is not that of an executor suing anybody's name. This is a case of a person accounting as executor for what he received under the Compromise Contract. He is to be sued, and was sued, as executor, and surcharged as executor P. R. C. of C. P. Sec. 590. He will also be relieved from his official responsibility as such executor. *Boerman* case, *ante.*

G—In view of the provisions of the Puerto Rico Code of Civil Procedure, *Mercado* v. *Mercado, ante,* does not affect the right of Petitioner to describe himself as accounting-executor.

There is no particle of logic in Respondents' argument that the case of *Mercado* v. *Mercado* affects the right of Mercado to appeal in the character in which he was sued as accounting-executor. There is a plain and patent difference between suing in the name of the estate and accounting as executor of an estate. *Clover* v. *Peterson* and *Estate of McPhee, ante,* point to this undeniable and logical difference, which difference cannot be obliterated by arguments directed to the support of a theory plainly technical and contrary to law.

Moreover, *Mercado* v. *Mercado* did not settle, and could not settle matters relating to the partition of the estate. Said case only recognized that said partition was to be made according to the Compromise Contract. That is all the effect that can be given to the *Mercado* case in regard to partition. The Compromise Contract lays down the general rules of partition, obligatory upon all signers, but it was not in itself and could not be the deed of partition, as shown by letter "m" of said Contract, providing that "the partitioner's report on the estate left at the death of don Mario Mercado Montalvo, *shall be executed by aforesaid partitioner and aforesaid four universal heirs.* . . . and

said Mister Porrata agrees that his total fee for the study, *preparation and execution of aforesaid partitioner's report on the distribution of the inheritance as provided in this contract,* with four certified copies to be furnished the heirs, should be and shall be twenty thousand dollars" etc. (Pr. Rec. 113, letter M). (Italics ours.)

H—Mercado Riera never divested himself of his character and obligations as accounting-executor. The alleged admissions (Respondents' Brief, p. 13), that the executor divested himself of the estate, except as co-owner, cannot be interpreted as meaning that he divested himself of his duties to account, which he was doing in a proceeding already going on in the Supreme Court of Puerto Rico. The duty to account is a legal requirement of the code, of which no executor can divest himself by his own will. P. R. C. of C. P. *ante.*

IV

This was not a case to be summarily affirmed or dismissed by the Circuit Court under Rule 39.

Rule 39 is divided into two sections, (A) and (B). The first requires the showing of the manner in which the federal questions alleged were raised. The second requires a *Statement on Appeal,* in which the appellant is supposed to show, even before the controversy starts and the record is printed, that the decision below, in matters of local law, is inescapably wrong, or patently erroneous. Part (B) of Rule 39 has met with plenty of complaints from the profession in the Island. In *De Castro* v. *Board of Comm.,* 322 U. S. 451, it was modified by this Supreme Court.

> "Thus interpreted and read in its context the principle, as restated in the Sancho Bonet Case, *that to justify*

reversal by the federal courts of a decision of an insular supreme court in a matter of local concern, 'the error must be clear or manifest; the interpretation must be inescapably wrong, is *not a mere mechanical device which requires or admits, save in exceptional cases, of the summary disposition of appeals from that court. Nor does it minimize the importance or dignity of the appellate function in such cases.* On the contrary, *we think that it imposes on the Court of Appeals and on this Court the peculiarly delicate task of examining and appraising the local law in its setting,* with the sympathetic disposition to safeguard in matters of local concern *the adaptability of the law to local practices and needs. It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved.*" 322 U. S. 458. (Italics ours.)

Respondents in their brief show a misunderstanding of the situation as explained and existing after the decision in the *De Castro* case.

When a question of local law is presented to the Circuit Court of Appeals, it is the task of that Court (called "delicate" by this Supreme Court) to fully appraise and examine the local law in its setting. After an appraisal of the local law ("with the sympathetic disposition to safeguard in matters of local concern, the adaptability of the law to local practices and needs"), the Court will then decide whether a clear and patent error, requiring reversal, was committed. *The doctrine of regard for local needs and practices is not a mechanical device to dismiss appeals, and provides no fetishism in favor of the decisions of the local courts.* This is the true situation now in regard to matters of local law.

Ours is a case where the principle of sympathetic regard for practices and needs is not relevant. Where is the local need or practice to be protected by the summary dismissal or affirmance of Petitioner's appeal? We are not dealing here with the 500 acre law or with the anti-monopoly statute, or any other public law—We are dealing here with the rights of people under statutes imported into Puerto Rico from the United States, and with questions of federal law, statutory and constitutional. If there is any ground for sympathy, it should be in the interest of an examination of the rights alleged to have been infringed. In our judgment from either the standpoint of local or federal law, statutory and constitutional, the refusal of the Circuit Court to hear this case on the merits, should be examined.

Rule 39 B of the Circuit Court, affects two million people. It contravenes a statute of Congress authorizing this appeal (28 U. S. C. A. Sec. 225, P. 295, 4th). And it is our firm belief that it should be repealed, not merely explained or modified as done in the *De Castro* case. Whether an error is or is not inescapable, is something to be decided within the merits of the case, and should never be a device to prejudice or dismiss appeals or *to practically modify an act of Congress given the right to appeal.*

Take, for example, one of the errors of local law alleged by Petitioner (those of federal law need no further illustration):

1—Mario Mercado Riera, accounting under the Compromise Contract, alleges that the Puerto Rico Court committed error in ordering him to make restitution to the estate of the sum of $20,019.15, paid as inheritance tax on the monies passing to the Partnership Mario Mercado e Hijos under said Compromise Contract (Pet. and Br., 10 and 24).

2—The opinion of the District Court of Ponce, in regard to this question, reads:

"With respect to part (B) of said impeachment No. 12, in connection with a restitution to the objectors of the sum of $20,019.15, as half of the inheritance tax paid on monies *belonging to the Partnership Mario Mercado e Hijos but which were improperly declared in the notice of decease of decedent Mario Mercado Montalvo* (ours: where is the improper declaration?), the court, as a result of the evidence introduced by both parties, concludes, and it so holds, that said $320,306.53, *as covenanted in clause third, letter (d) of the contract of compromise of September 9, 1938* (ours: to which contract the Partnership was a signing party), *exclusively belonged to the Partnership Mario Mercado e Hijos an entity distinct and apart from the decedent.* And, therefore, said sum of $320,306.53 was improperly included by the executor as part of the cash assets, in his notice of decease of the testator Mario Mercado Montalvo (ours: see illustration of what the executor really did, page 20, *infra*), and, therefore, *the inheritance tax paid upon aforesaid amount should not have been paid by the executor and charged to the estate of aforesaid testator.* (ours: means that Partnership must pay.)

"Therefore, the court is of the Opinion, and it so holds, that it should sustain (B) of the impeachment No. 12, and that, therefore, it should order, and hereby orders, that the executor make restitution to the final accounts, with legal interest, to the objectors, of the sum of $20,019.15, which is one half of the inheritance tax *improperly paid by said executor on a sum of money belonging exclusively to the Partnership Mario Mer-*

cado e Hijos" (Pr. Rec. 79). (ours: Court omitted to consider that the $320,306.53 were in testator's name at the time of his death.)

3—Looking at the mere language of the opinion of the Court, without regard to the intrinsic value of the reasoning, the above holding may seem right. Fundamentally, upon examination (*De Castro* case, *supra*), it is utterly erroneous. Let us see.

As appears from the Compromise Contract, at the time of the testator's death, there were $576,306.53 *"deposited in the name of the aforesaid testator in the Bank of Ponce and National City Bank of New York"* (Pr. Rec. 109-110). (Italics ours.) From this sum of $576,306.53 (we repeat: *which was in bank in the testator's name at the time of the testator's death*), the sum of $320,306.53 "entered in full" under the Compromise Contract, and became an asset of Partnership Mario Mercado e Hijos. *The Treasury of Puerto Rico was not a party to said Compromise Contract* (Pr. Rec. 94), *a fact very significant indeed.*

The situation, therefore, must be viewed in either one of two ways.

(A) Does the Puerto Rico Court mean that the executor was compelled by the Compromise Contract to conceal from the Treasury that $576,306.53, and not merely $256,000.00, *were in banks in the testator's name at the testator's death.* If it means that, the error is patent and inescapable, or even inconceivable, *to require of a quasi-public official the commission of an illegal act.* In other words: informing the Treasury of the total amount of money that was in banks in the testator's name at his death was not only a proper act of the executor, *but it was a plain legal obligation.* (Inh. Tax Laws of P. R., Laws of 1939, pages 672-3, sec. 5.)

(B) However, if the executor committed no wrongful act in disclosing the truth, the facts, to the Treasury, then if any controversy arises under the Compromise Contract, signed by the objectors and the Partnership, as to who should reimburse the tax paid on the monies passing to the Partnership (which the Treasury decided were to be computed in any way as a part of the estate), that controversy is between the objectors and the Partnership; never between the objectors and the executor, who merely informed the truth to the Treasury.

As the Partnership, signer of the contract, was not joined, the lack of jurisdiction is patent.

In other words: the legal obligation of an executor to pay the tax assessed is unquestionable. (Inh. Tax Law of P. R. Sec. 9, 1941 Compilation pp. 1176-1177.) If, under the Compromise Contract, the objectors had any right to be reimbursed for the tax paid from the Partnership, it was the duty of the objectors to raise the controversy with the Partnership, never with the executor.

4—The executor, it may be added by way of explanation, when informing the Treasury as to the amount of money in the testator's name at his death, did not add to the gross of the estate the $320,306.53 passing to the Partnership under the Compromise Contract. He simply complied with the contract and with his duties to the Treasury, reporting the situation as it truly and really occurred, in the following manner:

"Notification of Death (D. P. 105)

"Part of money in banks (Ours: in the addition and carrying forward column) $256,000.00

(Ours: Indented explanation given by the executor in the notification of death, and which shows that the $320,306.53 passing

to the partnership were not added to the assets of the estate):

"In the National City Bank Ponce Branch	$201,871.02
"In the National City Bank principal office at New York, N. Y.	200,084.95
"In the 'Banco de Ponce' Ponce, Puerto Rico	174,350.56
"Total of deposits	$576,306.53

"Note:—(Ours: placed by the executor to show the facts)

"The $320,306.53 which is the rest of this money, as owned by the decedent by the date of his death, shall pass without deductions, to the Partnership Mario Mercado e Hijos, to form the reserve fund of said Partnership."

In the manner indicated above, the executor complied, as is stated before, with his duty to the Treasury. Of his compliance with his legal obligation, no person has the right to complain. Neither can anybody complain of his paying the tax after it was assessed.

5—Furthermore: the objectors were notified of the final assessment and conclusion by the Treasury itself, under Section 7 of the Inheritance Tax Law of Puerto Rico. And, what is more important, *the objectors accepted the assessment and even complained of the executor's appeal to the Board of Review and Equalization* (Test. of Mr. F. Julia, Head of the Tax Bureau of Puerto Rico, T. E. 1153-1214).

For other mixed questions of local and constitutional law, see Petition and Brief, where a preliminary discussion is made to help this Court form its judgment.

V-A

Constitutional Questions: No case can proceed to judgment if indispensable parties are not brought into the proceedings.

A. In regard to the constitutional questions: it cannot be contested that the Partnership, Porrata and the four brothers, all of them, *were signers of the Compromise Contract, under which this impeachment of accounts proceeded.* Why the Partnership was not joined as a party to these proceedings, *is something that requires an examination here in the interest of real justice.* This Court may find that the objectors are trying to avoid the defenses that the Partnership might have against them, and that Porrata might have, too. It seems only fair and logical to say that each and every one of the signing parties to the Compromise Contract was bound to assume his responsibility to face the other party in the substantive as well as in the procedural way. Our case, it seems to us, is a typical one for this Supreme Court, either to order the Circuit Court to examine the questions presented fully, or to order a review here, so that justice be amply done to all parties concerned.

B. No case can go to judgment if indispensable parties are not called to the proceeding.

Shields v. *Barrow*, 58 U. S. 130 (1854);
Barney v. *Baltimore City*, 73 U. S. 280 (1867);
Commonwealth Trust Co. v. *Smith*, 266 U. S. 152 (1924);

Mine Safety Appliance Co. v. *Forrestal,* 326 U. S. 371 (1945);

Rule 19. *The fact that the judgment would not be technically binding upon the absent parties is not controlling;*

California v. *Southern Pacific Co.,* 157 U. S. 229 (1895);

Arizona v. *California,* 298 U. S. 558 (1936);

Vincent Oil Co. v. *Gulf Refining Co.,* 195 Fed. 434 (C. C. A. 5th, 1912).

For an analysis of the rule and collection of authorities see the opinion of Vinson, *J.* (now Chief Justice Vinson) in *Green* v. *Brophy,* 110 F. (2d) 539 (C. A., D. C., 1940).

Keegan v. *Humble Oil & Refining Co.,* 155 F. (2d) 971 (C. C. A. 5th, 1946); 6 Cyc. Fed. Proc. Sections 2136, 2140 (2d ed. 1943).

V-B

Constitutional Questions: One thing is an accounting between executor and heirs and another is an accounting under a contract to which other persons are also signing parties.

A. It is very significant that the Respondents, in their statement of the case (Resp. Br. 4), make no reference to the Compromise Contract, *basical fact and law of these proceedings.* Even though it is against their interest, Respondents must have the subconscious realization that their failure to join all the signers of the Compromise Contract in this case constitutes a failure of justice. Respondents prefer now to avoid any suggestions that might put the mind of this Court into the true source of the errors com-

mitted below. There being a contract among heirs, debtors and creditors of the estate (the said Compromise Contract), this accounting, proceeding under such contract (Pr. Rec. 35 t.), must join all the contracting parties, especially when one of the parties not joined (Partnership) is affected in a total sum of over a hundred thousand dollars.

B. However, Respondents, on page 33 of their brief allege:

> "The judgment of the local Supreme Court, which was affirmed by the Court of Appeals, rests on adequate non-federal grounds."

In that they are misleading this Court. Two illustrations are enough answer to Respondents:

Supreme Court opinion (Pr. Rec. 186):

> "The opposing heirs prayed that the executor be ordered to include in his final account the amount of said credit, plus interest thereon. The executor objected, and alleged that the lower court lacked jurisdiction within the proceeding for settlement of the final account, to decide whether or not Mario Mercado e Hijos was indebted to the heirs of Mario Mercado in the sum of $45,359.50, as a loan. The court held that it lacked jurisdiction to decide the question raised by the contestants, because 'it is convinced that in passing upon the additional opposition, marked with the letter (a), it would unavoidably have to pass upon the title, that is, whether or not the $45,359.50 belonged to Don Mario Mercado Montalvo when it was withdrawn from the National City Bank in order to be deposited in court by the partnership Mario Mer-

> cado e Hijos'; and because this was not a proper proceeding for establishing the ownership in favor of or against a third person, 'in this case, the partnership Mario Mercado e Hijos, over which the court has not jurisdiction in the present proceeding.'"

Same Supreme Court opinion (Pr. Rec. 157), on the federal estate tax controversy:

> "The controversy with the Federal Government can not be considered as a sufficient justification for the executor to refrain from paying the legacies at the proper time. That controversy was limited to the sum of $200,000 which was deposited in the National City Bank, in the city of New York, in the name of the testator. The executor could not dispose of that sum without first obtaining the corresponding release or transfer certificate."

And from everywhere in the record it is obvious that this is a typical case where federal questions are present and were passed upon by the Court. In any way, questions of due process are of fundamental character and reviewable, therefore, in any stage of the proceedings.

VI

All local questions presented before the Circuit were reviewable under the doctrine of the *De Castro* case.

The questions of local law involved here are discussed in the Petition and Brief. They constitute inescapable errors of the Court below. For example, charging Mercado Riera with the interest paid up to September 19, 1938, on the inheritance tax when the Compromise Contract provided for charging of the amount paid for each party to said party's respective share in the estate (Pr. Rec. 111-112 t.), is one error that requires review by the Circuit Court of Appeals. Also, holding time as of the essence of the Compromise Contract, though rejecting the executor's evidence to prove that it was not, and in the face of Respondents' Attorney's statement in open court,[1] constitutes a reversible error. Compelling the executor to answer for moneys which he did not receive without a showing of negligence, is, in our judgment, not authorized by local law, or by any other law. The same thing in regard to the ordering of changes or additions in the Compromise Contract affecting parties who were not joined, and for whom the executor was not supposed to answer. And finally, compelling the executor to reimburse a tax which was paid to the People of Puerto Rico after an assessment legally made against which the objectors presented no legal protest (*ante*, page 22); all these constitute inescapable errors of local law, requiring, to say the least, a review, which the Circuit Court erroneously denied.

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1 "MR. POVENTUD:—And why did you rely in what I told you when you knew that I merely was acting as an attorney, and not as a party to the contract?" (T. E. 407)

VII

Question as to the availability for certiorari of the points raised by our Petition and Brief.

Respondents, on page 4 of their brief, allege that this controversy is a private one between private citizens in a purely accounting proceeding. All civil cases participate of that same nature. Whatever public character they may have is reflected by the effect of the decision on all persons similarly situated in the general conglomeration of people.

However, the conclusive answer to Respondents is that, the questions debated here, concerning due process, are always new and reviewable by this Supreme Court; and the question as to the jurisdiction of the Circuit Court to affirm or dismiss under Rule 39 (b), concerns two million Puerto Rican people, and embraces a conflict between Congress and the judiciary in this country, affecting territories of the United States.

VIII

Question in regard to the printing of the record.

We see a certain degree of unfairness, on the part of Respondents, in raising the question relating to the partial printing of the record.

Petitioner's complaint in this case originates, among other reasons, from the procedure in the Circuit Court, of which Respondents took advantage. Thus, before the record was printed, and, on the basis of the typewritten record only, they, Respondents, filed their motion for summary dismissal or affirmance. Under Rule 39 (b), the Circuit Court authorizes that procedure, against which we are strongly protesting. When Respondents' motion for summary action was granted by the Circuit Court, Petitioner

ordered the printing of that part of the record that might be printed in time and necessary to show here the nature of the questions involved. The remaining unprinted record was forwarded to this Court by the Circuit Court, also on Petitioner's motion.

If certiorari is granted, this Supreme Court will order, the printing of the remainder of the record. If the case is remanded with an order to grant a full hearing, then the Circuit Court will order the printing, which it did not order before because of the practice under Rule 39 (b).

It would represent another act deserving our strongest protest, that Petitioner be now forced to answer or be made responsible for a practice in the Circuit Court against which Petitioner is complaining here, and whereby, under Rule 39 (b) he was denied the benefits of the same methods and procedure that are provided by law for appeals from other Courts in the United States. Congress made no distinction, and the Courts should not make any, either.

This point of Respondents, therefore, unfairly raised by them, only serves to establish the righteousness of our position.

Prayer

WHEREFORE, petitioner prays this Court to either grant us the writ of certiorari or a writ of mandamus, compelling the Circuit Court of Appeals to give us the hearing required by the Act of Congress granting Puerto Ricans the right to appeal from decisions of the Supreme Court of Puerto Rico to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 180

MARIO MERCADO RIERA,

Petitioner,

v.

ADRIAN MERCADO RIERA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Introductory

The above entitled cause really concerns questions of purely local law of Spanish origin, rightly decided, without dissent, by the supreme court of Puerto Rico. *Instead of dismissing the appeal, as misleadingly repeated in the Petition* (pp. 1, 8, 9, 26), *the Circuit Court of Appeals* for the First Circuit, in the interest of justice, *most properly and correctly affirmed the judgment of the local supreme court,*

under its Rule 39(b).[1] The court of appeals did not find any erroneous ruling by the Puerto Rico Supreme Court. On the contrary, it found that appellants "now apparently *for the first time,* assert the existence of a wide variety of questions of federal law. We have carefully considered their assertions and find them wholly unwarranted • • • Not only can we discern no 'clear or manifest error, or anything inescapably wrong' • • • in the decision of either of these questions of purely local-concern, or of any of the multitude of other similar questions presented, *but we cannot even discern any error at all in their decision.* Indeed, an inspection of the record and a study of the painstaking opinion of the Supreme Court of Puerto Rico, in which all questions presented were carefully, even elaborately, discussed, leaves us with the firm conviction that a hearing on these appeals could not possibly disclose the existence of any error of sufficient magnitude to warrant reversal • • •" 167 F. 2d 207, 208, emphasis supplied.

Opinions Below

The opinion of the supreme court of Puerto Rico is reported in *Mercado* v. *Mercado* (May 8, 1946), 66 D. P. R. 38-103, Spanish edition. A rehearing was denied and the judgment was thereupon reinstated (Partial Pr. R. 210, *Mercado* v. *Mercado,* 14 January 1947, 66 D. P. R. 801, 824, Spanish edition). English translations of the opinions appear in the partially printed record (Partial Pr. R. 130-192;

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[1] The propriety of proceedings under *Rule 39(b)* was sustained in *Mario Mercado e Hijos* v. *Commins,* 88 L. ed. 1396, 1399, col. 2 mid., 322 U. S. 465, 466 and in *De Castro* v. *Board of Commissioners,* 88 L. ed. 1384, 322 U. S. 451, 458. The appropriate exercise of appellate jurisdiction *on the merits* by the court of appeals, in view of the rule laid down by the United States Supreme Court, is fully explained in *Buscaglia* v. *Ligget & Myers Tobacco* (C. C. A. 1st, 1945), 149 F. 2d 493, 496, *footnote 3.* See also *Sosa* v. *Sosa* (C. C. A. 1st, 1947), 164 F. 2d 94; Point I-D, subdiv. 1, *infra.*

196-209).[2] The affirmatory decision of the Court of Appeals for the First Circuit (Partial Pr. R. 367-370) is reported in *Mercado Riera* v. *Mercado Riera* (April 9, 1948), 167 F. 2d 207-208.

Jurisdiction

The circuit court of appeals entered its judgment on April 9, 1948, *affirming* that of the insular supreme court upon a most careful consideration, under its Rule 39(b),[3] of a lengthy statement on appeal or brief submitted by petitioner on January 19, 1948, a motion to dismiss or affirm filed by respondents on February 27, 1948, a memorandum in reply lodged by petitioner on March 22, 1948, and the complete typewritten transcript of record on the appeal taken by said petitioner (Partial Pr. R. 370). A petition for a writ of certiorari was filed here on July 27, 1948, within an extension granted therefor (Partial Pr. R. 372). The jurisdiction of this Hon. Court is asserted by petitioner under the *Judicial Code*, §240(a) as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A. §347).

However, as hereinafter shown, the petition should be dismissed because there is no ground on which the reviewing power of the United States Supreme Court may be invoked. (See pp. 8-42.)

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[2] References are to a *partially printed* record and to the *complete, original or typewritten record* sent up by the Court of Appeals. The partially printed record will be designated as *"Partial Pr. R., p. ....."*. The *complete typewritten record*, as *"Typ. R., Oral Testimony, p. ...."*, or *"Typ. R., Documentary Evidence, p. ....."*. It will be noted that the "complete typewritten transcript" of the record (*Partial Pr. R.* 214) which, with the statement on appeal and briefs, was considered by the court of appeals in rendering its affirmatory judgment under its *Rule 39(b)* (*Partial Pr. R.* 367-370), has not been printed as required by *Rule 38*, paragraphs 1, 3 and 7, of the Rules of this Court (See Point I-E, *post*).

[3] See *Buscaglia* v. *Ligget & Myers Tobacco Co.*, 149 F. 2d 493, 496.

Statement of the Case

Petitioner's inaccurate, garbled statement and a proper understanding of the questions sought to be raised, require a brief reference to the essential facts and proceedings below.

Mario Mercado Montalvo died upon August 22, 1937, leaving a will (Partial Pr. R. 126-130), wherein he designated as his sole and universal heirs his four children, of full age, María-Luisa, Margarita, Adrián and Mario Mercado Riera. The latter, Mario, was appointed testamentary executor (Partial Pr. R. 17), *but his executorship was adjudged fully terminated as of September 1, 1939* (Partial Pr. R. 130 mid.).[4]

This case solely involves a controversy on final accounts first rendered by the ex-executor Mario, petitioner herein, to his three coheirs in March 1940 (Partial Pr. R. 18-25). The duty to submit accounts by extrajudicial executors to the heirs, upon the expiration of the executorship, mainly arises in Puerto Rico from the *Civil Code, ed. 1930, §829.* It is there provided that *"the executors shall submit an account"* of their incumbency to the heirs. Moreover, the parties here additionally stipulated for the rendition of final accounts by petitioner to his coheirs, on September 24, 1938 (Partial Pr. R. 111, Compromise Contract, clause 3, subdiv. g), which he did one year and six months later, or on March 6, 1940 (Partial Pr. R. 18), as also heretofore

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[4] Both local and national courts have held said petitioner's *extrajudicial executorship concluded by operation of law, ipso jure, on and since September 1, 1939. Mercado* v. *District Court* (July 14, 1943), 62 P. R. R. 350, syll. 2, affd. in *Mercado Riera* v. *Mercado Riera* (November 23, 1945), 152 F. 2d 86, cert. den. sub. nom *Riera* v. *De Belaval* (May 6, 1946), 90 L. ed. 1612, 328 U. S. 837, 66 S. Ct. 1010. See also *Mercado* v. *Mercado* (May 8, 1946), 66 D. P. R. 44, Spanish edition, Partial Pr. R. 130 mid., 145 bot.

judicially determined (*Mercado* v. *District Court,* 62 D. P. R. 359 top, affd 152, F. 2d 91, col. 1, top; *Mercado* v. *Mercado,* 66 D. P. R. at pp. 57 mid., 58, Spanish edition, Partial Pr. R. 130 bot., 143 bot., 145 mid.).

It was by this agreed medium—rendition of final accounts —that the ex-executor was to claim from his coheirs any proper, legal or *warranted charges against, or disbursement from, the hereditary funds.* So petitioner, though tardily, served his account to March 4, 1940 (Partial Pr. R. 18-25).

Respondents, through the stipulated procedure and believing there were numerous *omissions, charges or claims* by the ex-executor, petitioner herein, which were unwarranted or improper, due to his lack of power, as illegal, unnecessary or otherwise, duly filed in the Ponce district court, original (Partial Pr. R. 26-36) and supplementary (*ib.,* 53-55) *objections, challenging some of the items in the accounts rendered.* See also opinion of insular supreme court, Partial Pr. R. 131-136. A detailed answer or reply was then lodged by petitioner (Partial Pr. R. 36-53; 136-140).

This independent proceeding on the accounts was heard by the Ponce district court. The trial and presentation of evidence took 31 days, from October 14, 1940 to May 27, 1941 (Partial Pr. R. 57 top, 140 top). On February 19, 1942, the Ponce court, through Judge Sepúlveda, rendered its opinion (Partial Pr. R. 56-87) and final money-judgment (*ib.,* 88-92), whereby petitioner was ordered to pay or refund to the heirs the several amounts there set out (*ib.,* 88-92).

Mario Mercado Riera then appealed to the Supreme Court of Puerto Rico from the said district court's judgment on the accounts, and served notice of his appeal on his

three coheirs Adrián, María-Luisa *and Margarita Mercado Riera* (Partial Pr. R. 93 top).

On May 8, 1946, the local supreme court rendered a money-judgment modifying, and in some respects increasing, the Ponce district court decree dated February 19, 1942 (Partial Pr. R. 130-192; *Mercado* v. *Mercado,* 66 D. P. R. 38-103, Spanish edition). By that affirmance, the supreme court ordered Mario Mercado Riera, now petitioner, to pay or refund for his three coheirs the several sums therein specified (Partial Pr. R. 193-195).

Thereupon Mario, petitioner herein, as alleged "executor", attempted a new appeal to the circuit court of appeals for the first circuit, from the aforesaid judgment of the Island's supreme court dated May 8, 1946 (Partial Pr. R. 125), as reinstated on January 14, 1947 (*ib.*, 210).

Petitioner then lodged in the circuit court of appeals a 62-page statement on appeal or brief (Partial Pr. R. 214-278), with a typewritten record of over 2,500 pages. Under *Rule 39(b)* of the Court below, respondents moved to dismiss *or for a summary affirmance* of the insular supreme court's judgment (Partial Pr. R. 279-338), on the ground that it was manifest from the record submitted and the statement on appeal that the judgment appealed from by petitioner was obviously right and in nowise inescapably wrong or patently erroneous.

The court of appeals, upon a well considered examination and appraisal of the whole record and briefs presented by the parties, under its *Rule 39(b),* affirmed the judgment of the supreme court of Puerto Rico on April 9, 1948 (167 F. 2d 207, Partial Pr. R. 367-370). It held that after having carefully considered the federal questions asserted *for the first time on appeal,* they were found wholly unwarranted; and, as to the multitude of *local questions presented,* that an inspection of the record and a study of the

painstaking opinion of the Supreme Court of Puerto Rico, left the court of appeals with the firm conviction that a hearing on the cross-appeals therein taken *"could not possibly disclose the existence of any error * * * to warrant reversal. Under these circumstances it seems to us* [the court of appeals] *that the law permits summary affirmance under our Rule 39(b) since a hearing on the appeals would clearly be futile* (*Mario Mercado e Hijos* v. *Commins,* 322 U. S. 465, 566, 64 S. Ct. 1118, 88 L. ed. 1396) *and that justice requires summary affirmance in order to prevent further useless expense and delay in this already overly long and undoubtedly very expensive litigation."* 167 F. 2d 208, col. 2, Partial Pr. R. 369-370.

Questions Suggested by Petitioner

Petitioner attempts to urge two supposed types of questions: federal and local (Petition 3-7, 7-11). But *Points I and II* below, with their respective subdivisions, will clearly exhibit the unsubstantial nature and even the absence of the so-called federal questions, as well as the correctness and justice of the Puerto Rico supreme court's judgment, affirmed by the court of appeals, on the suggested points of insular or local law.

ARGUMENT

I.

Jurisdictional Objections: Dismissal of Petition for Certiorari

A. Petitioner lacks the necessary reviewable interest, as alleged "executor" of any "estate."

1. At the time of his purported appeal to the court of appeals and of his petition herein, petitioner's executorship had expired.

Upon March 6, 1947, petitioner attempted to appeal as alleged *"executor"* from the judgment of the insular supreme court to the court of appeals below (Partial Pr. R. 1-5). *No appeal was taken by him individually.* Petitioner even prays issuance by this Court of a writ of certiorari *"as executor of the estate of Mario Mercado, Sr."* (Pet., p. 1).

If petitioner was no executor in 1947, when his appeal to the court of appeals was attempted as above shown, nor at the time of his petition herein, he obviously has no right or interest, as such executor, which could then or may now be reviewed by this Hon. Court. Petitioner would have to show that he was on March 6, 1947 and still is, Mercado's executor. *But any such effort would amount to a defiance of repeated judicial decisions that petitioner's executorship expired on September 1, 1939. Mercado* v. *District Court* (July 14, 1943), 62 P. R. R. 350, syll. 2, affd. in *Mercado Riera* v. *Mercado Riera* (November 23, 1945), 152 F. 2d 86, cert. den. sub. nom. *Riera* v. *De Belaval* (May 6, 1946), 90 L. ed. 1612, 328 U. S. 837, 66 S. Ct. 1010. See also *Mercado* v. *Mercado* (May 8, 1946, Partial Pr. R. 130 mid.),

66 D. P. R. 44, Spanish edition. In rendering judgment in this case (8 May 1946), the Puerto Rico supreme court expressly reiterated (Partial Pr. R. 130 mid.):

> "On July 14, 1943, we rendered judgment in certiorari case No. 1517, setting aside the order sought to be reversed, *holding that the term of the executorship pertaining to the estate of Mario Mercado Montalvo, who died testate on August 22, 1937, expired, by operation of law, on September 1, 1939* * * *"

After that final and last decision (May 8, 1946, 66 D. P. R. 44, Sp. ed.), it is inconceivable that petitioner should still insist on claiming any reviewable interest herein, as alleged *"executor"*. He is subject to the federal appellate rule that, upon expiration or removal from office of personal representatives, the latter have no interest, as such, which will support appellate review.[5]

2. *Absence of any "estate" here that may be "aggrieved" by the Puerto Rico judgment.*

a. *If any such "estate" could be said to exist, it would be benefited, not aggrieved.*

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[5] *Slater* v. *Thompson, et al.* (C. C. A. 8th), 255 Fed. Rep. 768, syll. 2 (public administrator, after removal from office, has no interest in the estate which will support an appeal); *Taylor* v. *Savage*, 11 L. ed. 132; *Kimball* v. *Kimball*, 43 L. ed. 932 (where letters of administration revoked, writ of error will be dismissed, as court cannot decide moot questions; and neither laches nor consent of parties can authorize court to exercise jurisdiction); *Ex parte Zalduondo*, 47 P. R. R. at p. 249 ("Appellees also draw our attention to the fact that at the time of the appeal the commissioner had finished his duties and was *functus officio*. The appeal must be dismissed * * *"); 3 C. J., Sec. 490, p. 629; 4 C. J. S. § 182, p. 353 ("After termination of his official or representative capacity, one may not appeal * * *"; 4 C. J. S. pp. 372, 373; 3 C. J. 646, col. 2 mid. ("* * * after his letters have been revoked or he has been removed, he [executor or administrator] cannot maintain an appeal or writ of error on behalf of the estate").

Even if petitioner still were Mercado's executor, which is not the case as just shown, he could urge no reviewable interest, in a representative capacity, except in behalf of a decedent's estate *which is aggrieved by the decree rendered by the Puerto Rico supreme court,* as affirmed by the court of appeals. In order that a representative may appeal in his representative capacity, while it lasts, the estate allegedly represented must be aggrieved by the decree appealed from, otherwise any appeal must be taken in his individual capacity. *Succession of Hartigan,* 51 La. Ann. 126, 24 So. 794; *Moore* v. *Ferguson,* 72 N. E. 126 (Ind.); *Ansel* v. *Kyger,* 110 N. E. 559, 560 col. 2, mid. (Ind. A). See also cases in footnote 5, *supra.*

If such "estate" could be said to exist here, *it would certainly be benefited, "not aggrieved",* by the judgment below, in view that, respecting petitioner, as ex-executor, it only imposes personal or individual liability on him, by ordering said petitioner to increase or add to the hereditary assets, or to restore to the heirs, divers amounts improperly disbursed or charged by him (Partial Pr. R. 193-195, Puerto Rican judgment; *ib.,* 1-5, petitioner's notice of appeal from local supreme court's judgment).

b. *Parties hereto are not concerned with any "estate" in the sense intimated by petitioner.*

The Anglo-Saxon legal term *"estate"* includes the Spanish concept of *"testamentaría",* which is the equivalent of a *"judicial administration of an estate"* or of hereditary assets in custodia legis, i. e., under direct control and custody of an officer appointed by a court of justice. *The parties here are not and were never concerned with any such "estate" (testamentaría), since there has never been any judicial administration of the Mercado inheritance, as has been repeatedly adjudicated. Mercado* v. *District Court* (July 14, 1943), 62 P. R. R. 350, syll. 5, pp. 369-371,

affd. in *Mercado Riera* v. *Mercado Riera* (Nov. 23, 1945), 152 F. 2d 86, 96, cert. den. 90 L. ed. 1612, 328 U. S. 837.[6]

In *Mercado* v. *District Court, supra,* decided June 14, 1943, 62 P. R. R. 350, syll. 3, and at p. 367, it was further decreed that the extrajudicial Civil Code ex-executor, petitioner here, should restore the properties *"to all the heirs"*, and that since said executorship terminated *ipso jure* from September 1, 1939, *the execution of the will of the testator devolved upon the heirs,* according to the *Puerto Rican Civil Code, ed. 1930,* §§ 832 and 833 (see also Partial Pr. R. 130, mid., *Mercado* v. *Mercado,* 66 D. P. R. at p. 44, Spanish edition).

Therefore, any claim concerning the assets left by the common ancestor of the parties hereto, is and must be, on and after the expiration of petitioner's executorship on September 1, 1939,[7] *the personal and individual concern of the heirs or co-owners under local law, Civil Code* § 833, as construed by the insular supreme court. The well-established, binding authority of prior judicial decisions between the same parties, cannot be easily disturbed. They suffi-

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[6] In Puerto Rico, the appointment of an executor does not mean that the assets of the estate come under judicial administration. The executor spoken of in our Civil Law is not in the same position generally prevailing in the American legal system. *Aponte & Sobrino* v. *Heirs of Pérez,* 48 P. R. R. 437, 441-442. Administrators and executors in the United States fully represent the deceased; but in Puerto Rico, the principle of universal succession in a modified form applies and the heirs represent the decedent from the moment of the death and are entitled to all the property. *Pérez* v. *Succrs. of M. Pérez & Co.,* 41 P. R. R. 844, 845. The above cases were followed and applied in *Mercado* v. *District Court,* 62 P. R. R. at pp. 370-371, affd. 152 F. 2d at p. 87, col. 2 bot., cert. den. 90 L. ed. 1612, 328 U. S. 837.

[7] When the root is cut the branches fall. *Smallwood* v. *Gallardo* (Holmes, J.), 72 L. ed. 153, 156, col. 2 bot., 275 U. S. 56, 62.

ciently offset petitioner's untenable intimation that his alleged reviewable interest concerns an *"estate"*.[8]

In view that it has been judicially determined between the same parties that there never was any judicial administration of testator's assets, *there cannot possibly exist now any "estate" here, but only the personal liability of the ex-executor, petitioner here, for the economic values represented by the judgment below in favor of respondents.*[9]

Moreover, brief for respondents in opposition (pp. 115 mid., 112) to a prior certiorari petition (No. 908), October Term 1945, *between the same parties,* whose record is on

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[8] Any reference to petitioner as *"executor"* or to an *"estate"*, *instead of to hereditary rights, properties and liabilities which devolved upon the heirs, individually, since September 1, 1939,* are obvious misdescriptions or loose expressions, in view of controlling and binding decretal portions in judgments rendered by the courts, where the question as to cessation of the executorship on September 1, 1939, was finally determined. *Mercado* v. *District Court,* 62 P. R. R. 350; *Mercado Riera* v. *Mercado Riera,* 152 F. 2d 86, 96. col. 2 top, cert. den. *Riera* v. *De Belaval,* 90 L. ed. 1612, 328 U. S. 837. The court of appeals itself refers to petitioner as *"the ex-executor"* (167 F. 2d at p. 208, par. 2). As once stated by the Puerto Rico supreme court, judicial decisions deserve respect and observance by, at least, parties and privies. *Luce & Co.* v. *Cintrón,* 38 P. R. R. at p. 481 mid. And that should be the case *"if appellate decisions are to serve any purpose."* *Porto Rico Coal Co.* v. *Domenech* (C. C. A. 1st), 41 F. 2d at p. 185, col. 2 bot.

[9] The activities of an extrajudicial Civil Code executor (as petitioner here was) or of any "judicial administrator" may be put at an end by operation of law or by an order of court, *though the personal responsibility of the ex-incumbent for acts or omissions during the incumbency continues until finally discharged in the accounting proceeding* (*See Boerman* v. *Heirs of Boerman,* 52 P. R. R. at p. 597 top; insular supreme court's opinion, Partial Pr. R. 157 mid., citing *Sanchez Román, Derecho Civil,* vol. 11, p. 1454).

file in this Hon. Court,[10] and which was denied here (*Riera* v. *De Belaval*, May 6, 1946, 90 L. ed. 1612, 328 U. S. 837), also shows that the ex-executor, again petitioner here, without allowing the 60-days fixed by the Puerto Rico supreme court to elapse,[11] *admitted having completely disconnected himself from the hereditary assets "in every sense, except as co-owner thereof"*; that "all business concerning same must be transacted through the heirs and not through its executorship"; and that Mario Mercado Riera, now petitioner, bought from his three coheirs the latter's three-fourth interest in several urban properties which were part of decedent's assets, by public deed No. 44, dated November 18, 1943, executed at Ponce before Notary Public, C. J. Santiago Matos, whereby petitioner Mario paid vendors the sum of $70,350, which they applied with other funds to the extinction of their three-fourths share in some existing liabilities.

c. *Even the distribution or adjudication of the hereditary assets was contractually consummated by the coheirs, as has been judicially acknowledged.*

The distribution or adjudication of the hereditary assets *was contractually consummated* by the coheirs—being of

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[10] Federal appellate courts may examine their own records and take judicial notice thereof in regard to proceedings formerly had thereon by one of the parties to the litigation now before it. *Diminic* v. *Tompkins*, 48 L. ed. at p. 1114, col. 1 top; *De Bearn* v. *Safe Deposit & T. Co.*, 58 L. ed. at p. 836, col. 1 bot.; *National Fire Ins. Co.* v. *Thompson*, 72 L. ed. 881, syll. 1.

[11] In *Mercado* v. *District Court*, 62 P. R. R. 350, 373 mid., upon concluding, as aforesaid, that the executorship expired on September 1, 1939, and that the coheirs had already accepted the inheritance and agreed upon its adjudication as per their compromise agreement of September 9, 1938, *the insular supreme court ordered the ex-executor, within 60 days, to deliver the assets to the heirs*, so they might proceed to the further execution of testator's will under *Civil Code*, § 833 (62 P. R. R. at p. 373 mid.; see also Partial Pr. R. 130 mid.).

full legal age—thru their compromise agreement of September 9, 1938, clause 3rd, subdivisions (f) and (l). See Partial Pr. R. 110 bot., 113 top. To that contract by and between the heirs, *the then (1938) executor and commissioner expressly assented in so far as such distribution of the inheritance might in any way affect them* (Partial Pr. R. 112-113).

In the *Mercado* v. *District Court* case decided July 14, 1943 (62 P. R. R. 350 and at pp. 356 mid., 369 top, 372 top, affd. in *Mercado Riera* v. *Mercado Riera,* 152 F. 2d 86, 90, cert. den. 90, L. ed. 1612), the Island supreme court held, among other things, that when the executorship terminated on September 1, 1939, the execution of the will of testator devolved upon the heirs, *and also that the heirs had accepted the inheritance and agreed upon its distribution.* And from the judgment and decision of the Puerto Rico Supreme Court (May 8, 1946, Partial Pr. R. 192), affirmed by the Court of Appeals (167 F. 2d 207; Partial Pr. R. 367-370), it additionally appears that *the distribution and adjudication of testator's properties, and of such other assets "as may be discovered later" was agreed upon by the coheirs in clause 3, par. (f) of their compromise agreement* (Partial Pr. R. 110 bot.). In this connection, the insular supreme court reiterated in its opinion below:

> "The partition and allotment of the real property was agreed to by the heirs in paragraph (f), Third Clause of the compromise contract, thus:
>
> 'The remaining properties of the estate of Don Mario Mercado Montalvo, as shown by the aforesaid inventory, *together with any others which may turn up afterwards as belonging to the decedent,* shall be deemed, and *are hereby apportioned,* in equal shares, to the four heirs * * * who will at all times endeavor to avoid the continuation of the common ownership'. (Italics ours.)

"The previous apportionment of the properties, made by the heirs themselves in virtue of the compromise contract, was acknowledged by this court in Mercado v. *District Court,* 62 P. R. R. 350, 369. *Hence, it was not necessary to make any pronouncement, such as the one contained in the order appealed from, regarding the allotment of the properties, which the heirs had already apportioned among themselves, share and share alike."*

(Partial Pr. R. 192, *Mercado* v. *Mercado,* May 8, 1946, 66 D. P. R. at p. 102 mid., Spanish edition).[12]

In short, it is unquestionable that petitioner lacks the necessary reviewable interest in his asserted representative capacity *as alleged executor,* in view that his executorship expired since September 1, 1939, that there was *no "estate" here which might be "aggrieved",* but rather benefited by the Puerto Rico judgment, that the parties hereto are not concerned with any "estate" in the sense intimated by petitioner, and, lastly, because even the distribution or adjudication of the hereditary assets was contractually consummated by the coheirs thru their compromise agreement of September 9, 1938.

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[12] Associate Justice de Jesús, of the Puerto Rico Supreme Court, in his opinion on rehearing in this case, refers to the compromise agreement, as a *"partition contract"* (Partial Pr. R. 209 top) or as a *"contract of partition"* (*ib.*, p. 209, footnote 5).

And as repeatedly held in Puerto Rico, a voluntary distribution of the estate among heirs of legal age *renders entirely superfluous any further action by the ex-executor* (petitioner herein) *or the ex-partitioner* (Porrata, one of his attorneys), especially if they consented to the partition agreement and, a fortiori, if they subsequently permitted their incumbency to expire. See *Puerto Rico Code of Civil Procedure,* ed. 1933, § 604; *Ex. p. Sotomayor,* 24 P. R. R. 172; *Irizarry* v. *Registrar,* 22 P. R. R. 88; *Galindo y Escosura, Legislación Hipotecaria,* Vol. II, pp. 257, 258; *Mercado* v. *Mercado,* May 8, 1946, 66 D. P. R. at p. 102 mid. (Partial Pr. R. 192, insular supreme court's opinion).

B. There is no federal question involved here, much less of a substantial character.

1. *The determination by the Puerto Rico supreme court as to the reasonableness of certain allowances for traveling expenses and attorney's fees in connection with alleged services in the United States Tax Bureau, does not raise any federal question at all* (See Petition, Points I and II, pp. 3-4, 26-34).

Petitioner expends much argument respecting the nature of an alleged federal tax controversy which he and his attorney invited from the federal tax authorities, notwithstanding the inapplicability of the federal estate tax to Puerto Rican estates under the explicit mandate of *Section 9, Organic Act of 1917* (48 U. S. C. A. § 734, p. 230, 39 Stat. 954), providing that the statutory laws of the United States not locally inapplicable, shall extend to Puerto Rico, *"except the internal-revenue laws."* This statutory *exception* continued upon amendment of *Section 9, supra, on April 30, 1946* (60 Stat. 158, 48 U. S. C. A., Pocket Part 1947, p. 117 bot., § 734 as amended). The Federal Estate Tax Bureau, therefore, could reach no other conclusion than that the Mercado "estate is not subject to the provisions of the Federal estate tax law generally applicable to such citizens *in view of the specific provisions of the Organic Law of Puerto Rico"* (Petition, pp. 91-92).[13]

Yet, the only matter relating to the Federal Estate Tax Bureau was the $18,000 which petitioner, as accounting ex-executor of testator Mario Mercado Montalvo, the common ancestor of all the parties herein, paid to Pedro M. Porrata out of inheritance funds, charging same to his coheirs, as alleged attorney's fees in connection with a so-called

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[13] In *Piacentini* v. *Buscaglia*, 59 D. P. R. 782 mid., Spanish text, it is also said by the insular supreme court that the federal estate tax is inapplicable to Puerto Rico. However, this part of the opinion has been inadvertently omitted from the English text in 59 P. R. R. 777 mid.

federal inheritance tax matter (Partial Pr. R. 20 mid., 68 bot-69, 160 bot-161). The Ponce trial court partly allowed such fees after cutting them down to $4,000 (Partial Pr. R. 68 bot-69). It then ordered petitioner Mario to refund the overpayment amounting to $14,000 (*ib.*, p. 69 mid.). The allowance for fees was raised from $4,000 to $7,500 by the judgment of the Puerto Rico supreme court, but petitioner Mario was then required to restore or return to the heirs $10,500 instead of $14,000 (Partial Pr. R. 161 mid.).

There was also a claim for traveling and other expenses of the ex-executor (petitioner here) and Porrata for the same matter amounting to $13,450 (Partial Pr. R. 67 bot.).

Both of the above *claims were decided by the courts below on the evidence introduced* by the parties.

The Ponce trial court held (Partial Pr. R. 67 bot-69, 89 bot.):

> "*Impeachment No. 9.* This impeachment is to an item entitled 'Traveling Expenses and other expenses in the U. S. incurred by the executor and Pedro M. Porrata, amounting to $13,450, and the item of $18,000 in favor of the latter, for attorneys fees.'
>
> "*Decision:* The court, *after consideration of the evidence introduced by all the parties* in connection with the 9th impeachment, is of the opinion, and decides, that the journey to and stay in the United States of the executor in the company of attorney Pedro M. Porrata, in connection with the Federal estate tax controversy, were beneficial to the estate.
>
> "According to the testimony of the witness for the executor, Pedro Juan Rosaly and Ramiro Lazaro, the court is of the opinion that ten dollars ($10) daily is a just and reasonable per diem for expense of the executor Mario Mercado Riera, and an equal amount, for the same purpose, is a just and reasonable per diem for

Attorney Pedro M. Porrata, during his stay in the United States, from September 10, 1938 to March 15, 1939 (a period of 157 days). 157 days at $10 daily for the executor and another $10 daily for the attorney, make a total of $3,140. And granting them, furthermore, for their joint travel expenses, the sum of $810 equals a total amount of three thousand nine hundred fifty dollars ($3,950).

"The impeachment of said item of expenses is hereby sustained in part, said item being approved and confirmed to the extent of three thousand nine hundred fifty dollars (3,950) it being ordered that the difference between said amount and the original item, to wit: $8,050 be transferred to the assets of the final account.

"With respect to the item of $18,000 for fees claimed by Pedro M. Porrata, the court *upon consideration of all the evidence in this subject introduced by both parties, especially the testimony of attorney Pedro M. Porrata himself, from which it appears: that 'no fee contract was made, the criterion for his fees was that he should be paid according to the amount of the problems arising and the results obtained'; and that Mario Mercado Montalvo (the testator of the estate) paid the University expenses of attorney Porrata in the United States; that said attorney has been allowed $20,000 fees and expenses in the contract of compromise of September 9, 1938, for making the partition of the estate; that the attorney receives a retainer from the partnership 'Mario Mercado e Hijos' amounting to $150 monthly, and another from the Municipality of Guayanilla of $25 monthly, and that both retainers were received by him during his absence in the United States, and that the partnership 'Mario Mercado e Hijos' (the partners of which are the coheirs themselves) gives him free office space, the court calculates that four thousand dollars ($4,000) is a just*

and reasonable attorneys fee for attorney Pedro M. Porrata for his professional services rendered in connection with the Federal estate tax, and it so holds.

"The impeachment of said item for attorneys fees is therefore sustained in part, a fee of four thousand dollars ($4,000) being approved by the court it being ordered, therefore, that the difference of $14,000 be transferred to the assets in the final accounts.

"With respect to the item for $1,450 for extra expenses of attorney Pedro M. Porrata during his stay in the United States, the court is of the opinion that it should and hereby does sustain said impeachment; the entire amount of $1,450 should therefore be transferred to the assets in the final account, and it is so ordered."

On appeal, the insular Supreme Court determined:

"14. The executor and his attorney stayed in the United States, engaged in activities which the lower court deemed beneficial to the estate, from September 10, 1938, to March 15, 1939, or during a period of 157 days. In the final account of the executor the following items are charged to the inheritance in connection with that trip:

"(a) Traveling and extra expenses $13,450.00

"(b) Attorney's fees 18,000.00

"*Relying on the evidence introduced* by the contestants, the lower court reduced the first item to $3,950, assigning to the executor and his attorney a per diem allowance of $10 each • • • and adding to the total allowance of $3,140 the transportation expenses amounting to $810 for both travelers. *We fail to find any reason for disturbing the weighing of the evidence thus made by the lower court.* The item of $3,950 granted by the lower court is hereby approved. The

executor must reimburse the estate for the excess amount charged, that is $9,500, the restoration of which was ordered by the lower court.

"The second item was reduced to $4,000. *We agree with the lower court that the $18,000 charged to the heirs as attorney's fees, for work connected with the federal inheritance tax, is excessive.* Nevertheless, we think that the reduction made by the lower court, from $18,000 to $4,000, is also excessive. In view of the fact that Attorney Porrata remained in the United States, absent from his law office, during five months, which he devoted to the defense of the interests of the heirs, and that his services were beneficial to the estate, *we are of the opinion that the sum of $7,500 is a fair and reasonable compensation for the professional services thus rendered.* The item for attorney's fees will be increased to $7,500, and the executor must restore to the estate the difference, that is, the sum of $10,500 instead of that of $14,000 which he was directed to restore by the order appealed from" (Partial Pr., R. 160 bot.-161).

It leaps to the eye that, in passing on petitioner's claim in the accounts he rendered as ex-executor, regarding fees for attorney Porrata and respecting expenses in connection with alleged services before the Federal Estate Tax Bureau, the Puerto Rico supreme court, as concerns petitioner, did not and could not at all consider any federal question; *its judgment merely held, on the evidence, that $7,500 was a reasonable sum to be allowed, as a question of local law,* and petitioner was ordered to return to the heirs $10,500, excessively paid to his attorney Porrata; and the insular courts also allowed $3,950 for traveling expenses, but required petitioner to refund $9,500 improperly charged by him, as ex-executor, to his coheirs (Partial Pr. R. 161).

The record thus fails to reflect any definite or real federal question concerning petitioner, in regard to the federal estate tax law, its amendments or otherwise, as suggested by said petitioner.

The fact *that services might have been renderd before the Federal Estate Tax Bureau does not create any federal question, much less of a substantial character.* It follows that there is a total absence of any federal controversy in this proceeding. A large body of applicable decisions hold that even appeals should be dismissed for lack of appellate jurisdiction or as not raising a substantial federal question. *Stewart* v. *Kansas,* 60 L. ed. 120, syll. 2, 239 U. S. 14; *Zucht* v. *King,* 67 L. ed. 194, syll. 2, 260 U. S. 174, 176; *Kammerer* v. *Kroeger,* 81 L. ed. 254, 255, 299 U. S. 303-304; *South Bell Tel. Co.* v. *Oklahoma,* 82 L. ed. 752, syll. 2, 755, 303 U. S. 207, 212-213; *Patterson* v. *Stanolind Oil & Gas Co.,* 83 L. ed. 231, syll. 4, 233, 305 U. S. 376; *McArthur* v. *United States,* 86 L. ed. 1192, 315 U. S. 787; *Succession of Tristani* v. *Colón* (C. C. A., 1st), 71 F. 2d 374, syll. 1 and 2; *Rules 38, subdiv. 2 and 12, subdiv. 1, par. 3, of this Hon. Court; Rules C. C. A. 1st, No. 39(a).*

a. *Respondents' cross-appeal from the insular supreme court's judgment, also summarily affirmed by the court of appeals under its Rule 39(b), stood on a different footing.*

Concerning the reasonableness of Porrata's alleged fees and expenses, petitioner groundlessly states that this question was "admitted as federal by appellees [respondents here] themselves in their cross-appeal to the Circuit Court" (Petition, p. 34 mid.).

The situation regarding allowance by the courts below of $7,500 to petitioner on his account, as fees for Porrata's (one of his attorneys) claimed services before the Federal Estate Tax Bureau, stood on an entirely different footing. As demonstrated by respondents, as appellants in No. 4264 before the court of appeals, they consistently urged all

through this litigation that the ex-executor, petitioner herein, *was not legally entitled to any allowance for fees at all,* because it would contravene applicable, prohibitory, regulations of the United States Treasury Department, issued under the authority of certain Federal Estate Tax statutes. *Ludwig* v. *Raydure,* 25 Ohio App. 293, 157 N. E. 816, cert. den. 72 L. ed. 418, 275 U. S. 545; *Massilon Savings & Loan Co.* v. *Imperial Finance Co.* (1926), 114 Ohio St. 523, 151 N. E. 645; *Williston on Contracts,* § 1759.

As required by Acts of Congress and Treasury Regulations[14], *Porrata was not enrolled as an attorney in the Treasury Department* at the time of rendering or of agreeing to render his stated professional services to the ex-executor in the Federal Estate Tax Bureau. According to a certificate issued by the Committee on Enrollment and Disbarment, Treasury Department, *"Mr. Pedro M. Porrata does not appear on the records of the Committee on Enrollment and Disbarment as a person authorized to represent claimants before the United States Treasury Department or any of its bureaus or divisions" (Typ. R., Documentary Evidence,* p. 460, Exh. Q). Porrata himself so admitted in his oral testimony before the court of first instance at Ponce. He did not obtain or possess the Enrollment Card (*Typ. R., Oral testimony,* 924 bot., 926 bot.). He never filed any power of attorney (*ib.,* 909 bot., 910 bot., 912 mid.), nor the statement relative to fees to be filed with power of attorney (*ib.,* 923 mid., 924 top).

Under such circumstances, *applicable Federal Acts and Treasury Regulations* (footnote 14) precluded approval or allowance of any fees for services in any division or *bureau of the United States Treasury Department.* In consequence, Porrata was not even entitled to recover

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[14] *Treasury Regulations,* § 74; *Circular Letter No. 230,* Revised, U. S. Treasury Department, §§ 2a, 2(y), par. 3, 6(a), 8; *Conference and Practice Requirements,* Revised May, 1936, pars. I-II; Act of July 7, 1884, 5 U. S. C. A. § 261, 23 Stat. 258; 26 U. S. C. A. §§ 3900, 3901 (2).

therefor from the ex-executor, petitioner here, who plainly could not, in turn, charge or claim anything on that score from his coheirs in his final account in suit (Partial Pr., R. 20 mid.).

Hence, the federal question urged by respondents before the court below in their cross-appeal stood on a different footing and was substantial. However, respondents, after a re-appraisal of the whole situation, decided to abide by the court of appeals' summary affirmance as to their cross-appeal and to forego an attempt to unnecessarily burden the attention and docket of this Hon. Court.

2. *Questions as to alleged lack of due process on this record are fantastic.*

a. *The insular supreme court's judgment does not affect the partnership Mario Mercado e Hijos. Moreover, it was entered without prejudice to such partnership* (see Petition, Point III, pp. 5-6, 34-46).

Petitioner preposterously asserts that the partnership Mario Mercado e Hijos is an indispensable party to this proceeding impeaching the accounts rendered by him, as ex-executor, to his coheirs (Petition, Point III, pp. 5-6, 34-46).

The accounts were rendered by virtue of the compromise agreement of September 9, 1938, clause 3rd, paragraph (g), providing, in substance, for the rendition *of a final account by petitioner to his coheirs, and that any objections thereto by the latter* "shall be submitted to the corresponding court • • •" (Partial Pr., R. 111 mid., 114 top). It is plain, therefore, that all parties to the said compromise agreement provided a separate, plenary proceeding for an accounting between the ex-executor, now petitioner, and his coheirs (Partial Pr., R. 150 top). *It concerns no one else.* So, the Puerto Rico judgment, as to the items wherein the said partnership is named as possible debtor or otherwise, in no way affects or binds the said firm.

(1) Thus, respecting a certain chose in action for $45,359.50, which decedent Mercado Montalvo had loaned to the firm of Mario Mercado e Hijos, the Puerto Rico Supreme Court held that in the inventory attached to the compromise contract, *petitioner "failed to include the alleged credit for $45,359.50 in favor of the decedent and against Mario Mercado e Hijos; but it was expressly stipulated that all credits, rights, and claims belonging to the decedent which might turn up or be discovered in the future, would be considered as inventoried"* (Partial Pr., R. 191 mid.; see also compromise contract, *ibid.* 110 bot.; inventory, *ibid.* 122 bot.).[15]

The Puerto Rico supreme court further stated:

> "Mario Mercado Riera, besides being the executor and managing director of Mario Mercado e Hijos, was the person who signed and verified the complaint regarding the deposit of the $45,359.50; but neither in the books of the partnership nor in those of the executorship was any entry made respecting said deposit [Partial Pr., R. 186 top].
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> "The opposing heirs prayed that the executor be ordered to include in his final account the amount of said credit, plus interest thereon * * * [Partial Pr., R. 186 top].
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> * * * * * * * *

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[15] It follows that, contrary to petitioner's unwarranted assertion (Petition, pp. 35, 39 mid., 45 bot.), far from changing, invalidating or avoiding any contract, the local courts fully respected and applied the above named compromise agreement of September 9, 1938 (Partial Pr. R. 110 bot.; 122 bot.). The compromise agreement and the inventory, as determined by the courts below, both provided—and it was expressly therein stipulated by the parties thereto—that all other properties, credits or rights of testator, which may appear or be discovered in the future, are to be regarded as inventoried. Therefore, when omitted assets as the credit for $45,359.50 are ordered added or included, no change or amendment of any contract or inventory occurs, but only a clear compliance with the parties' intent and explicit agreement.

"The facts stated above are supported by the evidence introduced by the opposing heirs [respondents herein], *which was strengthened rather than controverted by the one adduced by the executor* [petitioner here]. *The purpose sought by the contestants in introducing their evidence was not to demand a decision adjudging Mario Mercado e Hijos to pay to the heirs of Mercado the sum loaned by Don Mario to the partnership to be deposited by the latter.* The lower court had no jurisdiction to make such an adjudication, inasmuch as Mario Mercado e Hijos was not a party to the proceeding nor had submitted itself in any way to the jurisdiction of the court.

"Nevertheless, the opposing heirs were entitled to introduce evidence tending to show that certain funds which personally belonged to the decedent had been loaned by the latter to the partnership Mario Mercado e Hijos in order to enable the latter to make the deposit in court. Since the evidence adduced was sufficient to establish *prima facie* the obligation on the part of Mario Mercado e Hijos to repay, to Don Mario Mercado or his heirs, the sum loaned, *the lower court had jurisdiction to order the executor to include the alleged claim among the assets of the estate. The mere inclusion of the claim in the inventory of the estate does not injure any right belonging to the supposed debtor, the partnership Mario Mercado e Hijos, inasmuch as the latter will have an opportunity to be heard and to defend itself if and when the allottee or allottees of said claim seek to enforce it by judicial action.* The only effect of the inclusion sought is to lay a foundation for the allottee of the claim to demand its payment.

"We have carefully examined the whole evidence. We regard it as ample and sufficient to establish prima facie the right of the opposing heirs to have included in the inventory, as chose in action belonging to the

estate, their right to claim the repayment of the alleged loan.

"The ruling complained of will be reversed and substituted by another directing the inclusion of the alleged claim in the inventory and in the final account of the executor" [Partial Pr., R. 186 bot.-187].

(2) Respecting another chose in action for $2,625 (half of $5,250), *which belonged to decedent and appears entered as "Fondo Panteón Familia" in the books of the firm Mario Mercado e Hijos, the insular supreme court merely ordered accounting-petitioner "to include in the inventory and in his final account a credit for $2,625,* that is, the one-half share belonging to the decedent out of the item *'Fondo Panteón Familia"*, which shows a total of $5,250, according to the account books of Mario Mercado e Hijos" (Partial Pr., R. 195 mid., 187 bot.-190).

(3) *Concerning the $16,392.25 interest improperly disbursed by accounting-petitioner, out of hereditary funds, on a debt due by the firm of Mario Mercado e Hijos, and not due by the testator or his heirs, it is petitioner*—not the firm, which had nothing to do with the accounting proceeding and was not even a party to it,—*who must repay or refund to respondents, according to the judgment of the supreme court of Puerto Rico, affirmed by the court of appeals* (Partial Pr., R. 151 bot.-154; *ib.*, 367-370). Regarding this item, the insular supreme court stated: "The contention of the appellant executor [petitioner here] is untenable, *as it is against the weight of the evidence and is based on a premise which is contrary to the real facts"* (Partial Pr., R. 152 bot.).

(4) *And with reference to the item of $20,019.15 which petitioner, as accounting ex-executor, unnecessarily and illegally paid as local inheritance tax on $320,306.53, despite the fact that the latter sum belonged to the firm Mario Mercado e Hijos, and was not part of the hereditary funds, it is not said firm nor the insular treasurer, but accounting petitioner who must refund to respondents, as rightly*

decided by both the district and the supreme courts of Puerto Rico (Partial Pr., R. 79, 90 bot., 142 mid.). The Ponce district court, affirmed by the insular supreme court and the Court of Appeals, correctly found that the aforesaid "*sum of $320,306.53 was improperly included by the executor* [now petitioner] *as part of the cash assets, in his notice of decease of the testator Mario Mercado Montalvo, and, therefore, the inheritance tax paid upon aforesaid amount should not have been paid by the executor* [petitioner herein] and charged to the estate of aforesaid testator" (Partial Pr., R. 79 mid.).

It will be easily observed that the partnership Mario Mercado e Hijos is not bound, affected nor ordered to do anything by the Puerto Rico supreme court's judgment. Rights of parties are adjudged solely by decretal portion of decree. *McGhee* v. *Leitner*, 41 F. Supp. 674, 675; *Certain etc. Corp.* v. *Wallinger*, 89 F. 2d 427, 429, col. 2; *Herb* v. *Pitcairn*, 89 L. ed. 790, syll. 6, 324 U. S. 117.

Moreover, *the accounting proceeding was not directed against the partnership Mario Mercado e Hijos.* Under Puerto Rican law *when a proceeding is not directed against a person, he is not a necessary party. Flores* v. *Llompart*, 50 P. R. R. 641, syll. 2, 645 mid.; *Pellicia* v. *Court*, 36 P. R. R. 588. Said partnership was not even a party to the accounting proceeding, and *under local law persons not parties are not bound in any way by result in former case. Carrera* v. *Brunet*, 47 P. R. R. 420, syll. 2.[16]

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[16] See also *Federal Land Bank etc.* v. *District Court*, 45 P. R. R. at p. 201 mid. (person not joined as party, not precluded from exercising in future any right to which he may be entitled); *King* v. *Fernández et al.*, 30 P. R. R. at p. 558 bot. ("of course, this statement is made only for the purposes of this suit. Margarida & Company are not a party to this suit and, therefore, cannot be prejudiced by it"); *Rosado* v. *Valentín*, 65 P. R. R. 536, 538 top (the judgment rendered in an action to which a person was not a party, does not bind him). To the same effect see *Maldonado* v. *Programa de Emergencia de Guerra*, decided by the Puerto Rico Supreme Court, June 22, 1948, not yet reported in English.

Furthermore, the judgment herein was expressly entered by the local supreme court *"without prejudice to any right which the partnership Mario Mercado e Hijos may have"* (Partial Pr., R. 195 top). It is obvious that any alleged rights that the partnership may have were not only not prejudiced but expressly preserved by the insular judgment, and the courts below could proceed with the adjudication of the suit as between the parties who were properly before it. *Gandía* v. *P. R. Fertilizer Co.* (C. C. A. 1st), 291 Fed. Rep. 19, syll. 4, p. 22 top, cert. den. 68 L. ed. 519; *Waterman* v. *Canal-Louisiana Bank & T. Co.*, 54 L. ed. 80, syll. 2.

b. *The insular supreme court's judgment decrees nothing against Pedro M. Porrata, who is not a party to, and has really no interest in, this proceeding* (Petition, Point IV, pp. 6 mid., 46-51).

With unshaken insistence, worthy of a better cause, petitioner keeps on parroting that Pedro M. Porrata, one of his attorneys herein, is an indispensable party to this proceeding because, years ago, he was named by testator, Mercado Montalvo, a commissioner for partition.

However, petitioner overlooks that the distribution or partition of the hereditary assets was contractually *consummated by the heirs* through their compromise agreement of September 9, 1938, clause 3rd, subdivs. (f) and (l) (Partial Pr., R. 110 bot., 112 bot.-113). *See ante* Point I-A, subdivision 2, letter "c".

In that contract by and between the heirs or parties herein, the then (1938) executor, now petitioner, and also Porrata, ex-commissioner for partition, *expressly assented in so far as such distribution of the inheritance might in any way affect them* (Partial Pr., R. 113 top). That the heirs accepted the inheritance and agreed upon its distribution, was expressly decided on July 14, 1943, by the Island's supreme court in *Mercado* v. *District Court*, 62 P. R. R. 350, and at pp. 356 mid., 357 mid., 369 top, aff'd in *Mer-*

cado Riera v. *Mercado Riera*, 152 F. 2d 86, 90, cert. den. 90 L. ed. 1612. *And in the case at bar*, the highest local court again held, May 8, 1946, *that the distribution and adjudication of testator's properties and of such other assets that may be discovered later*, was agreed upon by the coheirs in clause 3rd, paragraph (f), of their compromise agreement (Partial Pr., R. 192).[17]

Besides, in Puerto Rico, a voluntary distribution of assets among heirs of legal age, renders unnecessary any further action or intervention by an ex-executor (petitioner herein) or an ex-partitioner (as his attorney Porrata), particularly when, as here, they consented to the partition agreement and, a fortiori, if they later suffered their respective incumbencies to expire. See *Puerto Rican Code of Civil Procedure*, ed. 1933, § 604; *Pellicia* v. *Court*, 36 P. R. R. 588 (termination of executorship); *Ex parte Sotomayor*, 24 P. R. R. 172 (partitionship unnecessary); *Irizarr* v. *Registrar*, 22 P. R. R. 88 (to same effect); *Galindo y Escosura, Legislación Hipotecaria*, Vol. II, pp. 257 258 (to same effect).

It may be added that, as a matter of local law and practice, a commissioner in partition, to whom no term was fixed by testator to discharge his trust, as happened here, has only such time therefor as is allowed the executor by will or by law. Upon the expiration thereof, the execution of a testator's will devolves upon his heirs and the latter are not bound to make partition with any commissioner's intervention. This was so held by the insular supreme

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[17] In this regard, the Puerto Rico supreme court specifically stated: *"The previous apportionment of the properties, made by the heirs themselves in virtue of the compromise contract, was acknowledged by this court in Mercado* v. *District Court*, 62 P. R. R. 350, 369. Hence, it was not necessary to make any pronouncement, such as the one contained in the order appealed from, *regarding the allotment of the properties, which the heirs had already apportioned among themselves, share and share alike."* (Partial Pr. R. 192 mid., *Mercado* v. *Mercado*, May 8, 1946, 66 D. P. R., Sp. ed., at p. 102 mid.).

court in *Mercado* v. *District Court*, July 14, 1943, 62 P. R. R. 350, syll. 4, and at pp. 368, 369.

Futhermore, a similar contention as to Porrata's alleged character as an indispensable party was rejected by the court of appeals below in *Mercado Riera* v. *Mercado Riera*, Nov. 23, 1945, 152 F. 2d at pp. 96, col. 2 bot.-97. It was there found that Porrata, one of petitioner's attorneys, had no financial interest in any phase of the litigation.[18]

In the instant cause, the judgment involved does not in any way affect, order or direct anything against Porrata, *but simply and exclusively against petitioner Mario Mercado Riera, who is the single and only party directed to restore or refund to the coheirs the amounts specified in the judgments below* (Partial Pr., R. 193-195). And, as already established, rights of parties are adjudged solely by the decretal portion of judgments or decrees. It must be recalled, too, that the accounting proceeding, as heretofore shown, was not aimed against Porrata. It was a matter which legally and according to the compromise contract (Partial Pr., R. 111, par. "g") *should have been, and was, wholly ventilated only between petitioner, as ex-executor, and his coheirs,* to whom the accounts were rendered by the former.

It is crystal-clarity, therefore, not only that Porrata was not an indispensable party to the accounting proceeding,

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[18] In *Mercado Riera* v. *Mercado Riera* case (152 F. 2d at pp. 96, col. 2, bot.-97), the court of appeals stated: "His presence [Porrata's] is not easy to understand. *In the first place it does not appear that he has any financial interest in any phase of the litigation * * * his fee was agreed upon in the contract of compromise, and the appellees say in their brief and Porrata admitted in argument before us, that this fee has been paid in full * * ** In the second place *Porrata is not officially affected by the judgments rendered by the court below * * * But the short answer to Porrata is that only final decisions of the Supreme Court of Puerto Rico are reviewable by us on appeal* (§ 128 of the Judicial Code; 28 U. S. C. A., § 225) *and the final decisions of the court below are embodied in its judgments, not in its opinion, and its judgments, as we have shown, do not affect Porrata * * **" (Italics supplied).

but also that Porrata could not even have been a proper party therein. In consequence, petitioner's claim of lack of due process in this regard is not only fanciful, but plainly frivolous. It simply amounts to a storm in a teacup.

c. *Obvious frivolity of point on alleged lack of due process regarding coheir Margarita Mercado Riera* (Petition, Point V, pp. 5, 51-54).

The Puerto Rico supreme court, construing insular provisions and applicable decisions, as a matter of local law, determined that Margarita Mercado Riera, one of respondents and of petitioner's coheirs herein, is entitled to a one-fourth share under the judgment in this case (Partial Pr., R. 150, *Mercado* v. *Mercado*, May 8, 1946, 66 D. P. R., Sp. ed., pp. 38, syll. 4, and pp. 62 mid., 102 bot.).

Petitioner's astounding claim, however, is that his sister Margarita is entitled to nothing because, as he asserts, she was not an adverse party to him in the accounting proceeding. Petitioner appended as part of his *statement on appeal* filed in the court of appeals (Partial Pr., R. 277-278) what is by him called an "appearance" or "motion" by coheir Margarita Mercado Riera before the district court of Ponce, which he claims to refer to the items of impeachment involved in this controversy.

This announcement by petitioner (Pet. 51, 53, 54) points to the following conclusions regarding that exhibit:

(1) The very fact that an attempt was made to bring the so-called appearance or motion as an appendix to the statement on appeal before the circuit court of appeals, shows that it is no proper part of the record, thus meriting to be expunged or discarded.[19]

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[19] See *Paddleford* v. *Fidelity & Casualty Co. of N. Y.*, 100 F. 2d 607, syll. 11, p. 614, col. 2, mid., cert. den. 83, L. ed. 1060; *Ortiz* v. *Quiñones*, 40 P. R. R. 657 (record on appeal should contain only proceedings on which judgment below is based); *Martínez* v. *Central Coloso*, 39 P. R. R. 113 (appellate court cannot consider evidence not acted on by trial court).

(2) That document appears to have been filed in a different proceeding, as its filing date is 1937 (Partial Pr., R. 277), whereas the accounting proceeding began in 1940, when the final accounts were rendered by the ex-executor, petitioner herein (*ib.*, 18, 25 bot.).

(3) In any event, said appendix exclusively refers to the *"quarterly accounts"* for the *"period from 1st September to the 30th of November, 1937"*, without even showing the items therein involved, *while the present proceedings refer* to petitioner's final account to March, 1940 (Partial Pr., R. 18, 26, 53); and it also purports to refer to an alleged undertaking "in favor of the remaining coheirs" respecting items in such quarterly accounts.

(4) Though petitioner Mario appears to be one of the signers of said Appendix B, he does not thereby consider himself—though he would so regard his sister Margarita (Partial Pr., R. 246, l. 7; Petition, p. 53 near bot.)—*estopped* from claiming to be entitled to a one-fourth of most of the items ordered by the supreme court to be restored by said petitioner.

(5) But the litigant really *estopped* from claiming that his coheir Margarita Mercado Riera is not an adverse party to him in the accounting, is petitioner himself, as exhibited by the very record he has sent up here. It shows that petitioner Mario Mercado Riera, on appealing to the local supreme court from the Ponce trial court's decision on the accounts, explicitly recognized his sister Margarita as one of the judgment creditors or adverse parties to him in this proceeding. *For that reason petitioner Mario, then addressed and served on respondent Margarita copy of his notice of appeal to the Island's supreme court, along with service thereof on co-appellee's, now respondents, Adrián and María-Luisa* (Partial Pr., R. p. 93 top, 2d line, p. 94 mid.).

Moreover, the Puerto Rican Code of Civil Procedure, ed. 1933, § 589, in part provides that *"if no objection be filed*

to an account, if in the opinion of the court the account is just and correct, an order approving same shall be entered", etc. *So, even when a coheir or any other interested party does not impeach the accounts, it is the court's duty, of its own motion, to carefully scrutinize all accounts and reject all claims which are improper, illegal or unjust. Estate of Anderson,* 74 Cal. 199; *Estate of Franklin,* 133 Cal. 584, 587; *Estate of More,* 121 Cal. 635.

Petitioner's point is so absolutely groundless and devoid of reason that the insular supreme court dismissed it *on purely local considerations,* as follows:

> "The third assignment presents a question which offers no difficulty whatever. The appellant executor [petitioner here] complains of his being compelled to restore the amount mentioned in the judgment appealed from as if the four heirs had objected when only two of them had actually challenged the accounts. The only reasonable interpretation of the judgment is that the executor should restore to the hereditary estate the sums which, according to the judgment, he has improperly disbursed. When making the final payments to the heirs, *each of these,* the contestants, as well as those who failed to challenge the account, will be entitled to receive one-fourth of the total amount restored to the estate" (Partial Pr., R. 150).

It is again manifest that the supposed lack of due process respecting this point is another of petitioner's whimsical conceptions.

C. The judgment of the local supreme court, which was affirmed by the court of appeals, rests on adequate non-federal grounds.

The record exhibits that the supreme court of Puerto Rico *did not pass* upon any federal question and that its judgment was solely predicated upon sufficient non-federal

grounds, that is, simply on sound local law of long standing (see insular supreme court's opinion, Partial Pr. R. 130-192). It was in the court of appeals that petitioner attempted to urge, as federal matters, the foregoing groundless points hereinbefore considered (167 F. 2d 207-208).

The rule is well known that when, as just stated, the judgment of the Island's supreme court, now sought to be reviewed, is supported by sufficient non-federal reasons, any contention regarding the existence of a federal question becomes untenable and dismissible. *Bell Telephone Company of Pennsylvania* v. *Van Dyke,* 80 L. ed. 379, 296 U. S. 533; *Woolsey* v. *Best,* 83 L. ed. 3, syll. 4, 299 U. S. 1; *Southwestern Bell Teleph. Co.* v. *Oklahoma,* 82 L. ed. 752, syll. 2, 303 U. S. 206; *McGoldrick* v. *Gulf Oil Corp.,* 84 L. ed. 536, 309 U. S. 2; *Holley* v. *Lawrence,* 87 L. ed. 434, 317 U. S. 518; *Flourney* v. *Wiener,* 88 L. ed. 709, syll. 4, 321 U. S. 253; *Herb* v. *Pitcairn,* 89 L. ed. 790, syll. 5, 324 U. S. 117; *Copperweld Steel Co.* v. *Industrial Commission,* 89 L. ed. 1363, syll. 2, 324 U. S. 780.

D. Lack of adequate or valid reasons for allowance of certiorari or mandamus herein.

1. *The propriety of Rule 39 of the Court of Appeals was settled by this Court in Mario Mercado e Hijos* v. *Commins, 88 L. ed. 1396, 1399, col. 2 mid., 322 U. S. 465.*

Instead of dismissing the appeal, as erroneously stated in the Petition, pages 1, 8, 9, 26, the court of appeals, after extraordinary scrutiny of *the complete typewritten record, the statement on appeal and reply brief presented and submitted by appellant, now petitioner,* as well as of respondents' motion to affirm under Rule 39(b), upon consideration of the merits of the controversy, affirmed the judgment of the insular supreme court on April 9, 1948 (Partial Pr. R. 370). It is thus crystal clear that the court of appeals did not fail to give complete considera-

tion to petitioner's appeal nor did it, in any way, minimize the importance of its reviewing function but, in fact, it fully discharged its duties and appropriately exercised its appellate jurisdiction on the merits by rendering an opinion and entering its affirmatory judgment (Partial Pr. R. 370). Such correct attitude and action on the merits is significantly silenced by petitioner and substituted in his petition herein for the ungrounded, really misleading assertion that petitioner's appeal was simply *dismissed* below (Petition, pp. 1, 8, 9, 26).

Without support in fact or in law and among the supposed reasons urged for a certiorari, petitioner states that the court of appeals treats "appeals from Puerto Rico in a different manner from appeals coming from other jurisdictions in the federal system" (Petition, p. 11 mid.). What petitioner apparently purports to reflect, as he unwarrantedly says in his petition (p. 2 mid.), is that Rule 39(b) of the court of appeals shows a "discrimination toward Puerto Rican appeals." But this very matter was brought to this Court's attention in *Mario Mercado e Hijos* v. *Commins* (1944), 88 L. ed. 1396, 1399, col. 2 mid., 322 U. S. 465, 64 S. Ct. 118. In that case, the court of appeals for the first circuit, under its Rule 39(b), summarily *affirmed* a judgment of the supreme court of Puerto Rico as involving questions of local law where the statement on appeal did not show the judgment appealed from to be inescapably wrong or patently erroneous. This Court then held that the judgment was *"so manifestly correct as to warrant affirmance without a hearing, on mere inspection on the face of the record, under a rule of the Circuit Court of Appeals for the First Circuit* [Rule 39(b)] *authorizing the summary dismissal or affirmance of judgments appealed from the Supreme Court of Puerto Rico involving only questions of local law* unless it appears from the record and appellant's required 'statement on appeal' that the judgment appealed from is inescapably wrong or patently erroneous." *Hijos* v. *Commins,* 88 L. ed. 1396,

1397, col. 2 near mid., 1399, col. 2 mid., 322 U. S. 465, 471. *Thus, the question posed has already been settled by this Hon. Court in the Commins case. That, of itself, would suffice for a dismissal or denial of the petition herein. Rule 38(5)(b), paragraph 3,* of this Court.

Moreover, one of the functions of the statement on appeal required to be filed by Rule 39(b) of the Court of Appeals is to disclose the basis on which it is contended the appellate court has jurisdiction by exhibiting, in appeals from Puerto Rico, that the proper jurisdictional amount is involved; and, where the jurisdiction is predicated upon a substantial federal question, by stating the grounds on which it is contended that the questions are substantial, specifying when and the manner in which they were raised, as well as the way in which they were passed upon below, etc. *This statement on appeal is analogous to the "jurisdictional statement" required to be filed by amended paragraph 1 of Rule 12 of the Rules of this Supreme Court of the United States* (316 U. S. 715, 86 L. ed. 719).

Rule 39(b) of the Court of Appeals for the First Circuit requires of appellant, in appeals from the Supreme Court of Puerto Rico *involving questions of local law,* to show in his statement on appeal that the judgment appealed from is inescapably wrong or patently erroneous. *Sancho Bonet* v. *Texas Co.* (1940), 308 U. S. 463, 84 L. ed. 801.[20] It also provides that the court of appeals will entertain a motion by appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither inescapably wrong nor patently erroneous, and consequently should not be disturbed; and it allows, in the alternative, a motion to dismiss the

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[20] In *De Castro* v. *Board of Commissioners* (1944), 88 L. ed. 1384, 322 U. S. 451, this Court re-examined the "inescapably wrong" rule and re-affirmed the same after explaining its history and the reasons of policy which led to its formulation.

appeal, all of which, with a supporting brief, to be filed within 20 days after filing and service of the statement on appeal. *Rule 26, paragraph 3,* of the Court of Appeals for the First Circuit, as to appeals from other jurisdictions than Puerto Rico, also provides for *motions to affirm* on the ground that it is manifest that the appeal was taken for delay only or that the questions on which decision of the cause depends are so unsubstantial as not to need further argument, and that such motion may be united in the alternative with a motion to dismiss. *Said Rules 39(b) and 26(3) of the Court of Appeals are substantially similar to paragraph 3 of Rule 12* (306 U. S. 696), *and to paragraph 4, Rule 7, of the Rules of this Hon. Supreme Court of the United States* (306 U. S. 690).

The core and purpose of these rules is to prevent baseless appeals. They allow motions to dismiss on jurisdictional grounds *or to affirm when it is manifest that an appeal is taken for delay or that the questions on which the cause depends are so unsubstantial as to need no further argument.* In fact, there is reliable information for the assertion that, at least 50% of the appeals to this, our highest national Court, are dismissed or the judgments affirmed upon considerations of the jurisdictional statement before the records are printed and without oral argument. See *American Bar Association Journal,* May 1945, Vol. 31, p. 239, col. 1 mid.

Furthermore, as above stated, the court of appeals in the instant cause, far from dismissing petitioner's appeal from the local supreme court, properly and fully performed its appellate duties by going into the merits of the case upon the statement on appeal with supporting brief and the reply brief submitted by petitioner himself, as well as on respondents' motion to affirm under its Rule 39(b). Thereafter, upon a most careful consideration of the whole matter, the judgment of the insular supreme court was affirmed on April 9, 1948, because "*under these circumstances it seems to us* [the court of appeals] *that the law*

permits summary affirmance under our Rule 39(b) since a hearing on the appeals would clearly be futile (*Mario Mercado e Hijos* v. *Commins,* 322 U. S. 465, 466) *and that justice requires summary affirmance in order to prevent further useless expense and delay in this already overly long and undoubtedly very expensive litigation''* (Partial Pr., R. 370).

Finally, the court of appeals' affirmatory opinion and judgment were rendered in conformance with the procedure under *Rule 39(b)* as expounded by the lower court in *Buscaglia* v. *Ligget & Myers Tobacco Co., Inc.* (C. C. A. 1st, 1945), 149 F. 2d 493, 496, footnote 3, as follows:

> "The propriety of this rule was discussed in *Mercado e Hijos* v. *Commins,* 1944, 322 U. S. 465, 64 S. Ct. 1118, 88 L. Ed. 1936. It has not been our idea, by the use of this rule, to avoid giving due consideration to the questions presented in appeals from the Supreme Court of Puerto Rico concerning matters of local law. Rather, the purpose has been to save needless expense and delay, involved in the printing of the record and hearing the case on oral argument. As a matter of fact, a large proportion of the cases coming to us from Puerto Rico in regular course are submitted on brief. The 'statement on appeal' which appellants are required to file by our Rule 39 is supposed to contain a succinct statement of the case and of the issues of local law presented, together with appropriate citation of authorities, designed to show that the judgment of the Supreme Court of Puerto Rico is manifestly erroneous. It really amounts to a short brief. *If the appellee moves to affirm under Rule 39(b),* he may, and usually does, file a brief in support thereof. After we examine the typewritten record, including the opinion of the court below, the statement on appeal, and appellee's brief in support of his motion to affirm, we sometimes find that *the judgment of the Supreme Court of Puerto Rico is so 'manifestly correct' as to*

make an appeal therefrom frivolous. We also sometimes find a case presenting fairly debatable questions of law which we would find it puzzling to decide if we were free to take a wholly independent view, but where, from the very fact that the case is a debatable one on its merits, we are morally certain that we should be obliged to affirm the court below, since its judgment is not 'inescapably wrong.' In both these situations we have conceived it to be proper to affirm under Rule 39b, without having the record printed and the case set down in regular course for oral argument."

2. *Review on a writ of certiorari is not a matter of right, but of sound discretion and will be granted only where there are special and important reasons therefor* (Rule 38(5) of this Court).

a. *The points and reasons relied on by petitioner here are, indeed, really frivolous* as the judgment of the supreme court of Puerto Rico, affirmed by the court of appeals, (1) in no way conflicts with any applicable decisions of this Hon. Court or with applicable local decisions, (2) nor does it depart from the accepted or usual course of judicial proceedings, (3) or in any way concerns the public interest.

As already demonstrated, petitioner even lacks the requisite standing or reviewable interest herein (this Point I, *subdiv. A, ante*); there is really no federal question involved here, much less of a substantial nature (I-B, *subdiv. 1, supra*); the insinuated lack of indispensable parties is not only far-fetched but, indeed, fantastic (I-B, *subdiv. 2*); and the judgment of the Island's supreme court, affirmed by the court of appeals, is based on adequate non-federal grounds (Point I-C, *ante*). It further appears that all points of local law urged by petitioner merely concern esoteric questions of Puerto Rican law, evidence and prac-

tice (Point II, *subdivisions A to C, post.*). As to these matters of local law and practice, the court of appeals also stated that it could—

> "• • • discern no 'clear or manifest' error, or anything 'inescapably wrong' • • • in the decision of either of these questions of purely local concern, or of any of the multitude of other similar questions presented, *but we cannot even discern any error at all in their decision.* Indeed, an inspection of the record and a study of the painstaking opinion of the Supreme Court of Puerto Rico, in which all questions presented were carefully, even elaborately, discussed, *leaves us with the firm conviction that a hearing on these appeals could not possibly disclose the existence of any error of sufficient magnitude to warrant reversal* • • •"
> (167 F. 2d 207, 208, emphasis supplied).

Uninterrupted and numerous rulings of this Court point to the doctrine of deference to the understanding of matters of local law as expressed in the pronouncements of insular tribunals. Their decisions, even when reviewable, should not be disturbed except upon a clear showing of patent or inescapable error. *Díaz* v. *González y Lugo,* 67 L. ed. 550, 552, 261 U. S. 102, 105-106; *Bonet* v. *Yabucoa Sugar Co.,* 83 L. ed. 947, syll. 2, p. 949, 306 U. S. 505, 510; *Bonet* v. *Texas Co. (P. R.) Inc.,* 84 L. ed. 401, 405, 308 U. S. 463, 471; *Puerto Rico* v. *Rubert Hermanos,* 86 L. ed. 1081, syll. 1 and 2, p. 1088, col. 2 mid., 315 U. S. 637, 646; *De Castro* v. *Board of Commissioners,* 88 L. ed. 1384, 322 U. S. 451; *Hijos* v. *Commins,* 88 L. ed. 1396, 322 U. S. 465.

b. The foregoing manifestly exhibits that *the certiorari petition suggests no reviewable question,* and much less any point *which it is in the public interest to have necessarily decided by this Court* of last resort. *Southwestern Bell Tel. Co.* v. *Oklahoma,* 82 L. ed. 752, syll. 2, 755, 303 U. S. 207, 212-213. *The record discloses that the controversy in the Puerto Rico supreme court involved only questions of a private character between private litigants in a purely local accounting proceeding.*

In *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 67 L. ed. 922, 924, col. 1 bot., this Court held that jurisdiction to bring up cases by writs of certiorari from circuit court of appeals, was conferred upon the Supreme Court of the United States for two purposes: first, to secure uniformity of decisions between those courts in the ten circuits; and, second,

> "• • • to bring up questions of importance which it is in the *public interest* to have decided by the court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*"

3. *The alternative extraordinary remedy of mandamus is obviously unwarranted.*

Petitioner himself claims that this case "falls squarely within the plain terms of Section 240(A) of the Judicial Code, as amended by Sec. 1 of the Act of February 13, 1925 (43 Statutes 938) • • •" (Petition, p. 2 top). That is now included in 28 U. S. C. A., § 347, pp. 259-260, where it is provided that when certiorari is proper it shall have the same effect "as if the cause had been brought • • • by unrestricted writ of error or appeal"; but its *subdivision (c)* states that "no judgment or decree of a circuit court of appeals • • • shall be subject to review by the Supreme Court otherwise than as provided by this Section."

As often stated by this Court, the drastic and extraordinary remedy of mandamus should be reserved for really extraordinary causes, and cannot be resorted to when there are other adequate modes of review, as by certiorari or appeal.[21] See *Ex Parte Fahey* (1947), 91 L. ed. 2041, 2043,

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[21] Petitioner also admits that he voluntarily forewent his right to move for a rehearing in the Court of Appeals (Petition, p. 2).

332 U. S. 258; *Kay Ferer, Inc.* v. *Hulen*, 160 F. 2d 147, syll. 3, p. 148, col. 2 bot.

Hence, if petitioner relies on certiorari as his appellate remedy, it leaps to the eye that mandamus cannot be invoked, as it does not lie to review a decision, as the one here involved, made by the court of appeals below in the exercise of its lawful jurisdiction. *Ex Parte Roe*, 58 L. ed. 1217, 1218, col. 1 mid.; *Ex Parte Riddle*, 65 L. ed. 725, 726, col. 2 bot.

A fortiori when, as appears from this Point I-D, *subdivision 1 above*, the court of appeals did not dismiss or decline its jurisdiction over petitioner's appeal from the judgment of the local supreme court. On the contrary, the intermediate federal appellate court went fully into the merits of the case and, after most carefully considering the statement on *appeal filed by petitioner*, respondents' motion to dismiss or affirm, the *reply brief or memorandum additionally submitted by petitioner himself*, and the complete typewritten transcript of the record, decreed and decided to affirm the judgment of the supreme court of Puerto Rico, under its *Rule 39(b)* (Partial Pr. R. 367-370).

E. The complete transcript of the record, on which the affirmatory judgment of the court of appeals was based, has not been printed and thus served, as required by the Rules of this Court.

The opinion and judgment of the supreme court of Puerto Rico, dated 8 May 1946 (Partial Pr. R. 130, 193), was based upon a record sent up by the trial court comprising "a transcript of the testimony which covers 2,838 pages and a transcript of the documentary evidence which comprises 855 pages * * *" (Partial Pr. R. 143, 368 mid.).

Such complete transcript of record with judgment roll containing the pleadings, opinion, judgment and other proceedings in the local supreme court, was lodged in the court

of appeals on January 19, 1948, together with petitioner's statement on appeal (Partial Pr. R. 213 mid., 214 top).

It now appears that petitioner, for the purposes of his petition for a certiorari, has caused to be printed only a part, referred to as the "judgment-roll" (Partial Pr. R. 371, 1-210), of the complete typewritten record which the court of appeals considered in rendering its affirmatory judgment on April 9, 1948 (Partial Pr. R. 214, 368 mid., 370 mid.).

The necessity of printing the complete transcript of the record, especially when the judgment of the insular supreme court, affirmed by the court of appeals, primarily rests on evidence, oral and documentary (Point II, *post.*), is patently shown by the fact that even the petition itself refers to documentary proof and the testimony of witnesses included in the complete *typewritten* record (Petition, pp. 26 mid., 28, 29, 60, 64, 66, 67, 70, 73, 76, 77).

Subdivisions 1, 2 (par. 4), 3 and 7 of Rule 38 of this Court, require that the petition for review on certiorari of a decision by a circuit court of appeals shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is to be directed; and that the certified transcript of the record be printed, and such printed record together with the petition, etc., is to be served on counsel for respondent within 10 days after the filing. Since the quoted provisions of Rule 38 of this Court have not been complied with by petitioner, respondents submit such omission as an additional and sufficient reason for denying the petition (*Rule 38, subdiv. 2, paragraph 4,* of this Court; *Stever* v. *Rickman,* 27 L. ed. 861, col. 2, 109 U. S. 74-75).

II.

The record, statement on appeal and briefs submitted to the Court of Appeals, required a summary affirmance of the insular Supreme Court's judgment (Rule 39b, CCA).

A. The judgment of the local Supreme Court on the points insinuated by petitioner, even if reviewable here, should not be disturbed as it merely deals with local law, evidence and practice.

That the points mentioned by petitioner in his Statement on Appeal below (Partial Pr. R. 214-275) and in his Petition here (pp. 7-11) solely refer to *local questions*, sufficiently appears from the foregoing considerations. But that will be additionally exposed by briefly examining the so-called *points of local law* alluded to by petitioner.

1. Alleged errors of local law regarding "partition"; petitioner's duty to refund $2,102.98 as interest unnecessarily paid by him on satisfying certain legacies; also $13,452.29 by him negligently disbursed; and concerning certain evidence respecting the meaning of "time" as used in the compromise contract.

a. *The local question as to agreed distribution and adjudication of testator's properties* (see Petition, Point IV, pp. 7, 46-51).

The point relative to the coheirs' agreed distribution and adjudication of their testator's assets is fully dealt with in Point I-A, *subdivision 2, letter "c"*, wherefrom it unquestionably appears that the insular courts have repeatedly passed upon this matter, adjudging that testator's properties were distributed and adjudicated in the Compromise Agreement executed by petitioner and his three coheirs on September 9, 1938 (Partial Pr. R. 110, bot., 113 top). *Mercado* v. *District Court*, 62 P. R. R. 350 and at pp. 356

mid., 357, 369 top, 372 top, affd. in *Mercado Riera* v. *Mercado Riera*, 152 F. 2d 86, 90 cert. den. 90 L. ed. 1612; *Mercado* v. *Mercado*, 66 D. P. R. at p. 102 mid., Spanish edition (Partial Pr. R. 192).

b. *The $2,102.98 interest outlay which petitioner was ordered to refund, as interest unnecessarily paid by him on satisfying certain legacies* (see Petition, Point VI, pp. 7, 54-64).

Concerning this item, the Ponce trial court held:

"With respect to part (B) of the 7th impeachment to wit, 'Unnecessary payment of interest, prejudicial to the estate,' amounting to $2,102.98 on the first partial payment of legacies, the court finds as follows:

"With respect to part (B) of Impeachment 7th, the Executor rendering the accounts replied as follows:

"(1) That there was no money available for the payment of the fourth part of the legacies, not even on October 1938; and

"(2) That the controversy with respect to the Federal Estate tax made impossible the application of the assets of the estate to payment of liabilities.

"In the testament (Exhibit No. 1 for the executor) it was provided that all legacies (except that of Pastor Mandry) would begin to bear interest at 7 percent per annum at the expiration of ninety days from the decease of the testator, and that they would be payable, the fourth part of each, 'from the cash on hand in banks, and the rest within a term of four years, at the rate of one-fourth part per year.'

"(The legacy to Pastor Mandry for $100,000 was to bear interest at the rate of 4 percent annum.)

"In order to pay aforesaid legacies in the manner provided by the testator the executor obtained the agreement of the co-heirs (article 824, No. 2, Civil Code, 1930 Ed.) in the contract of compromise signed

on September 9, 1938. (Exhibit No. 2 of the executor, 3rd clause, letter j.)

"It appears from the inventory (Exhibits C and D of the objectors) that the net assets of the estate amounted to $929,430.48. From said inventory and from the final accounts rendered by the executor (Page 3) the sum of $264,894.83 appears as cash on hand and in banks on September 9, 1938; and there appear accounts receivable by the estate and payable by the partnership 'Mario Mercado e Hijos', in the sum of $413,064.63.

"*It has been proven that in October 1938 there was sufficient cash to make the payment of the fourth part of the said legacies.*

"With respect to the Federal tax controversy, the court is of the opinion that said matter did not prevent in any way the use of monies possessed in Puerto Rico, as the 'transfer certificate' (Exhibits Nos. 42 and 43) from the Federal Internal Revenue Bureau shows that the only sum which was not available to the estate, by reason of the Federal tax controversy, was the sum of $200,000 located in the city of New York, U. S. which were deposited in the National City Bank, and which were not available unless a release or transfer certificate were previously obtained from the Government.

"Therefore, the court is of the opinion and so orders, that the sum of $2,102.98 of unnecessary interest paid by executor on the first installment of aforesaid testamentary legacies should be transferred to the assets of aforesaid final accounts" (Partial Pr. R. 64-65).

This phase of the Ponce court's decision was thus affirmed by the local supreme court:

"8. In the eighth assignment it is urged that the lower court erred in ordering the executor to restore $2,102.98 claimed to have been unnecessarily disbursed in making the first payment on account of the legacies.

"The first partial payment of legacies and interest thereon was made by the executor on May 23, 1939, and, according to the final account, it amounted to $86,250. The opposing parties urged that the executor could have made those payments seven months before the time he did, that is, on October 22, 1938, *inasmuch as on that date there were sufficient assets on hand, the use of which would have prevented the unnecessary outlay of the sum paid as interest.*

"In the will of the decedent it was directed that all the legacies, with the exception of that belonging to Pastor Mandry, should bear interest at 7 per cent per annum after ninety days had elapsed from the death of the testator, and should be paid, one-fourth of each legacy 'out of the cash deposited by him in the bank, and the balance within four years, at the rate of a one-fourth portion each year.' The legacy of $100,000 in favor of Mr. Mandry would bear interest at 4 per cent per annum.

"The consent of the heirs to the payment of the legacies, as required by § 824(2) of the Civil Code, 1930 ed., was granted to the executor by the Third clause, subdivision (j), of the compromise contract.

"The executor attempted to excuse his delay in making said payment, by alleging (a) that in October 1938 there were no funds available for the payment of the one-fourth portion of the legacies, and (b) that the claim of the Federal Government regarding the payment of an inheritance tax prevented the application of the assets of the estate to the payment of the liabilities thereof.

"*The findings made by the lower court are supported by the evidence, which we have carefully examined.* According to the inventory, the net assets of the estate amounted to $929,430.48. That inventory and the final account of the executor show that on September 9, 1938, the cash deposited in the banks and on hand was $264,894.83, and the sums owed by

the partnership Mario Mercado e Hijos to the heirs amounted to $413,064.63. *It is manifest that in October 1938, the executor had in his possession ample funds enabling him to satisfy the legacies at that time and thus avoid the payment of interest.*

"The controversy with the Federal Government can not be considered as a sufficient justification for the executor to refrain from paying the legacies at the proper time. That controversy was limited to the sum of $200,000 which was deposited in the National City Bank, in the city of New York, in the name of the testator. The executor could not dispose of that sum without first obtaining the corresponding release or transfer certificate.

"The lower court did not err in holding that the executor, as a trustee, was answerable to the heirs for the sum unduly paid. See Sanchez Roman, Derecho Civil, vol. 11, p. 1454" (Partial Pr. R. 156-157).

c. *Evidentiary matter regarding petitioner's negligent interest disbursement of $13,452.29* (see Petition, Point VI, pp. 7, 56-64).

The $13,452.29 which, due to petitioner's negligence, the Puerto Rican Treasurer charged for unnecessarily delayed payment by the executor of the local estate tax, *both courts in Puerto Rico, on the evidence by them considered, ordered petitioner to refund* (Partial Pr. R. 75-79, 157-160, 193-195).

Petitioner had obligated himself in the compromise agreement to file decedent's death notice with the Treasurer *within 10 days from said agreement* on September 9, 1938, so as to avoid a delayed payment of the local estate tax (Partial Pr. R. 111 mid., letter "i", 158 mid.). At the Ponce trial court, petitioner unilaterally tried to relieve himself from said contractual duty by his attempted parol evidence that the agreement was changed "at the moment of signing the contract" (*Typ. R., Oral Testimony,*

285 top; Petition, 66-70). Upon objection to such testimony by one of respondents' counsel on the ground that the testimony would amend, modify or alter a written contract validly made by the interested parties, etc. (*Typ. R., Oral Testimony,* p. 285 mid.), counsel for petitioner stated to the court that the intention was not to change the terms of the compromise contract but that "before the contract was signed" petitioner notified all the parties who signed the contract "including Mr. Poventud * * * that on the next day he was sailing for the United States" (*ib.,* 286 mid.). Thereupon Mr. Poventud, of counsel for respondents, stated: "*There is no such thing as to me*" (*ib.,* 286 mid.).

Then, respondents moved the trial court to strike out petitioner's testimony whereby he sought to change or vary the compromise agreement on the point aforesaid, *on various grounds of local law,* such as the *Law of Evidence,* § 24 (best evidence rule), § 25 (the parol evidence rule), § 101, pars. 2 and 3, as well as § 1186 of the *Civil Code,* ed. 1911 (§ 1172, *Civil Code,* ed. 1930); that such testimony tended to suppress petitioner's contractual obligation which bound him to file decedent's death notice within 10 days from the agreement; that no issue had been raised by petitioner as to the validity of the compromise contract; that the admission of said testimony would constitute a collateral impeachment of such contract; that under the local Civil Code, ed. 1930, § 1715, a compromise agreement amounts to *res judicata* between the contracting parties; that such contract was signed, accepted, ratified and presented in evidence by petitioner himself who could not, therefore, impeach it; that after he had so presented the agreement in evidence, it did not lie in his power to accept it in part, as to what he thought might favor him, and to reject its residuary portions; that no basis had been shown as required by the *Law of Evidence,* § 36, par. 5, as to any previous agency to modify the contract for respondents, etc. (*Typ. R., Oral Testimony,* pp. 556-558).

Dr. Belaval, one of the parties to the compromise contract (Partial Pr. R. 95), also substantially testified in the trial court that anything not found in the contract was not agreed upon (*Typ. R., Oral Testimony,* p. 1542 bot.).

The court of first instance at Ponce struck out or eliminated "that part of the statement of the witness which refers to Mr. Poventud" (*Typ. R., Oral Testimony,* pp. 352, 358), and also made a more considered and comprehensive ruling granting the motion to strike (*ib.,* 595-597), *thus according due weight and respect to the compromise agreement as written, accepted and put into operation by the parties themselves.* Petitioner himself cannot but concede that "a contract cannot be made for the parties by the court; it can only enforce an existing one * * *" (Petition, p. 74 top).

Petitioner's statement on appeal in the lower federal appellate court (Partial Pr. R. 246 bot.) and his petition herein (p. 7), not only admit that the foregoing are *"questions of local law"*, but also state that *"This point of local law raises a question of evidence"* (Petition, p. 65 mid.). Hence, the rulings below should not be disturbed, as the local supreme court, *after a very careful consideration of the evidence,* found, reasoned and concluded, thus:

> "11, 12 and 17.—These three assignments should be discussed jointly, inasmuch as they involve the same question. The appellant executor [petitioner here] urges that the lower court erred:
>
> "(a) In not admitting evidence to show that the 10-day period fixed by the compromise contract for the payment of the inheritance tax is and should be interpreted as a merely directory condition.
>
> "(b) In not holding that if said condition was not directory, it was impossible of performance under the evidence introduced.

"(c) In compelling the executor to restore to the heirs Adrián and María Luisa Mercado Riera the sum of $13,452.29, that is, one-half of the $26,904.58 collected by the Treasurer of Puerto Rico as surcharges on the amount of the inheritance tax.

"The opposing heirs contend that the agreed term for the notification of death and payment of the inheritance tax was definite and mandatory in character; that compliance therewith was possible; and that the court *a quo* did not err in ordering the restitution of the sum unnecessarily paid by the executor.

"The *trial court made the following findings:*[22]

"That the statutory term of 180 days, counted from the date of the death of the decedent, expired on February 18, 1938, and the executor did not file a notification of the death of the testator nor pay the inheritance tax until February 29, 1940, that is, two years and ten days after the expiration of said term.

"That under the compromise contract (Third Clause, subdivision (i)) of September 9, 1938, the executor bound himself to file the notification of death 'within the ten days following this date', and further bound himself to pay, upon the liquidation of the tax, the portion thereof pertaining to each of the heirs and legatees.

"That on the day following the execution of the contract, the executor left for the United States in order to attend to the matter of the federal inheritance tax and did not return to the Island until March 15, 1939; and that 49 days after his return, that is, on May 3, 1939, the executor filed the notification of death

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[22] The Ponce district court also found: " * * * *The inventory of the properties composing the estate had been agreed upon and prepared by the coheirs themselves and had been incorporated in the contract of compromise which was signed on September 9, 1938, that is, the day before the executor departed for the United States.*" (Partial Pr. R. 78 top.)

of the decedent. It took the Treasurer 115 days to liquidate the tax, which was paid on September 29, 1939.

"The lower court held that the absence and stay of the executor in the United States 'did not constitute unsurmountable obstacles to a compliance by the executor with the obligation contracted by him to file the notification of death within the agreed term of ten days', for even while he was in the United States he could have directed his subordinates, agents, or attorneys to prepare and send said notification, together with the inventory, which had already been accepted by the interested parties and attached to the compromise contract. (Section 5, 'An Act to Modify and Extend the Inheritance Tax', amended by Act No. 136 of 1939) (Laws of 1939, p. 672).

"The above cited § 5 of the *Inheritance Tax Act* imposes on every executor or person authorized to administer an estate, the duty 'to transmit to the Treasurer of Puerto Rico within the sixty days following the date of the death of the decedent whom he represents, a sworn notification of the death of said decedent, stating plainly: the name and residence of said decedent; the date of his death; * * * and as nearly as possible, the amount, valuation, description, and location of the estate of the decedent; etc.'. The Treasurer for just cause may grant an extension not exceeding sixty days for the filing of said notification. Section 9 of the same Act provides that the inheritance tax shall be paid 'within the term of one hundred and eighty days after the death of the decedent'; and if it is not paid within said term, 'interest at the rate of 1 per cent for each month or fraction thereof shall be charged and collected thereon.'

"Since the decedent died on August 22, 1937, the term of 60 days granted by said Act to the executor for filing the notification of death expired on October 21, 1937; and the term of 180 days allowed for paying

the tax expired on February 19, 1938, after which date the Treasurer was entitled to charge and collect interest at the rate of 1 per cent per month on the amount of the tax.

"On September 9, 1938, when the compromise contract was executed, the executor had already failed to comply with the provisions of the statute and imposed on the heirs the additional burden of having to pay interest at 1 per cent per month on the amount of their respective shares. The lower court did not err in holding that the stipulation to the effect that the executor 'within the ten days following this date, SHALL MAKE *the corresponding notification of death to the Treasurer of Puerto Rico' and that, once the liquidation was made, 'the executor shall pay for account of each heir, as well as of the various legatees, the portion of the inheritance tax pertaining to each', was not a merely directory condition but a definite and mandatory agreement, whereby the executor bound himself to carry out what the law compelled him to do in order to avoid the payment of interest.*

"Since the evidence shows that the executor had in his possession at all times sufficient funds for the payment of the inheritance tax, and since the executor failed to present any legal excuse sufficient to justify his delay in making such payment, it is just that he should be charged with the obligation of returning to the two opposing heirs the sum of $13,452.29 claimed by them. [At footnote 3, the Puerto Rico supreme court cites: '*The Harriman* v. *Emerick,* 19 L. ed. (U. S.) 629; *Klauber* v. *San Diego Street Car Co.,* 95 Cal. 353; *Jacksonville* v. *Hooper,* 40 L. ed. 515; 93 *Jur. Civil Española,* pp. 345, 346-350']." (Italics ours.) (Partial Pr. R. 157 mid.-160, 192 bot.; see Ponce trial court's decision, *ib.* pp. 75-79 top, 90 top.)

Therefore, it is undeniable that the decision and rulings of the Ponce district tribunal, as affirmed by the insular supreme court and by the court of appeals, concerning matters of purely local law and evidence, far from being erroneous, *are right and patently correct.*

2. *Imaginary errors as to credit for $45,359.50, loaned by decedent to firm of Mario Mercado e Hijos* (Petition, Point VIII, pp. 8-9, 70-72); *and respecting $15,535.70, being the difference between a testator's credit of $428,600.33 entered by petitioner in his account as $413,064.63* (Point IX, Petition, pp. 9, 72-74).

a. *Item or chose in action for $45,359.50* (Petition, pp. 8, 70-72).

The supreme court of Puerto Rico held includable by petitioner in his accounts to the heirs, a chose in action for $45,359.50, which decedent had loaned to the partnership Mario Mercado e Hijos. In the absence of any proper help in petitioner's statement on appeal before the court below (Partial Pr. R. 261-265) and in the petition herein (pp. 70-72), by way of pointing out concrete problems or questions for this Hon. Court's consideration, respondents feel bound to supply such deficiency by setting out the insular supreme court's relevant findings and views on the points which petitioner generally insinuates or merely mentions.

On the item now considered, the supreme court of Puerto Rico found:

> "IX. The facts which gave rise to this assignment are, in brief, as follows:
>
> "Mario Mercado Montalvo had a personal savings account in the *Ponce branch* of the National City Bank of New York. The balance which existed in his favor in that account, at the time of his death on August 22, 1937, amounted to $201,871.02.
>
> "On April 5, 1937, Mr. Mercado personally withdrew from that account the sum of $47,000. Pur-

suant to his instructions, the bank transferred the $47,000 to its central office in San Juan to be delivered to José R. Peralta, Manager of Mario Mercado e Hijos. On the same day said sum was delivered to Peralta and Pastor Mandry, Jr., against the receipt signed by the former on behalf of the partnership Mario Mercado e Hijos. On the following day, Peralta and Mandry tendered to Elvira Olivieri Cummins and the Lluveras, of Yauco, the sum of $45,359.50, by reason of a priority which the partnership Mario Mercado e Hijos claimed in connection with the purchase of certain land. Upon the refusal of Mrs. Olivieri and the Lluveras to accept the money, Mr. Mandry brought an action against them in the District Court of Ponce, and on behalf of the abovementioned partnership he deposited that sum in court.

"In the inventory attached to the compromise contract, the executor failed to include the alleged credit for $45,359.50 in favor of the decedent and against Mario Mercado e Hijos; but it was expressly stipulated that all credits, rights, and claims belonging to the decedent which might turn up or be discovered in the future, would be considered as inventoried. In the notification of death sent to the Treasurer, the executor included as belonging to the decedent the balance which appeared in the savings passbook, amounting to $201,871.02; and on the basis of that sum he paid the inheritance tax.

"Mario Mercado Riera, besides being the executor and managing director of Mario Mercado e Hijos, was the person who signed and verified the complaint regarding the deposit of the $45,359.50; but neither in the books of the partnership nor in those of the executorship was any entry made respecting said deposit.

* * * * * * * *

"The facts stated above are supported by the evidence introduced by the opposing heirs, which was strengthened rather than controverted by the one adduced by the executor. The purpose sought by the contestants in introducing their evidence was not to demand a decision adjudging Mario Mercado e Hijos to pay to the Heirs of Mercado the sum loaned by Don Mario to the partnership to be deposited by the latter. The lower court had no jurisdiction to make such an adjudication, inasmuch as Mario Mercado e Hijos was not a party to the proceeding nor had submitted itself in any way to the jurisdiction of the court.

"Nevertheless, the opposing heirs were entitled to introduce evidence tending to show that certain funds which personally belonged to the decedent had been loaned by the latter to the partnership Mario Mercado e Mijos in order to enable the latter to make the deposit in court. Since the evidence adduced was sufficient to establish prima facie the obligation on the part of Mario Mercado e Hijos to repay, to Don Mario Mercado or his heirs, the sum loaned, the lower court had jurisdiction to order the executor to include the alleged claim among the assets of the estate. The mere inclusion of the claim in the inventory of the estate does not injure any right belonging to the supposed debtor, the partnersip Mario Mercado e Hijos, inasmuch as the latter will have an opportunity to be heard and to defend itself if and when the allottee or allottees of said claim seek to enforce it by judicial action. The only effect of the inclusion sought is to lay a foundation for the allottee of the claim to demand its payment.

"We have carefully examined the whole evidence. We regard it as ample and sufficient to establish prima facie the right of the opposing heirs to have included in the inventory, as a chose in action belonging to the estate, their right to claim the repayment of the alleged loan.

"The ruling complained of will be reversed and substituted by another directing the inclusion of the alleged claim in the inventory and in the final account of the executor" (Partial Pr. R. 185-186 top, 186 bot.-187).

b. *Deficit of $15,535.70 as to an item in the accounts* (Petition, Point IX, pp. 9, 72-74).

Likewise, it was decreed below that petitioner restore $15,535.70, as the difference between a decedent's credit, which the ex-executor (petitioner herein) reported to the insular Treasurer at $428,600.33, *whereon he paid local estate tax out of hereditary funds*, but which credit, in his final account, petitioner had entered at only $413,064.63. The trial court ordered restoration by petitioner in his account of said testator's credit at $428,600.33 (Partial Pr. R. 82 bot.). The insular supreme court modified the district court's judgment only to permit accounting petitioner "*to include as liability in his final account* the sum which, according to *the liquidation by the Treasurer* and the vouchers in his possession, was paid to the insular Treasury as income taxes owed by the testator at the time of his death (Partial Pr. R. 171 mid., 193 bot., *Mercado* v. *Mercado*, May 8, 1946, 66 D. P. R. 82-83, Spanish edition; italics supplied).

In the interest of clarity, respondents more fully quote from the Ponce district court's decision:

"Additional Objections Letters (B) and (C). *Decision.* The court, after having considered the documentary and testimonial evidence introduced by both parties and especially Exhibit No. 25, arrives at the conclusion, and it so Holds, that it should sustain and hereby sustains Additional Objection Letter (B) • • • and therefore, it orders that the executor include in his final accounts the sum of $428,600.33, instead of the sum of $413,064.63 appearing in the final accounts as 'Testator's Credit against the Partnership Mario Mercado e Hijos' " (Partial Pr. R. 82 bot.).

The Supreme Court of Puerto Rico, on this item finally adjudged that:

> "3. The order appealed from is modified in the sense of ordering the accountant [petitioner here] to enter in his final account the sum of $428,600.33 in lieu of the sum of $413,064.63, which originally appeared in that account as the amount of the credit owned by the decedent against the partnership Mario Mercado e Hijos; but the accountant is authorized to include as a liability in his final account the sum which, according to the liquidation made by the Treasurer and the vouchers in his possession, was paid to the Insular Treasury as income taxes owed by the testator at the time of his death" (Partial Pr. R. 193 bot., judgment; *ib.*, 169-171, opinion).

The foregoing conclusions clearly indicate that the local matters passed upon by the lower courts were rightly decided. Obviously, petitioner is not entitled to a fourth hearing *de novo*. In the interest of public policy and the quiet of families, there must be an end to needless litigation.

3. *Alleged error regarding petitioner's duty to refund $20,019.05 illegally paid by him as local estate tax on $320,306.53, which was not part of the hereditary assets* (Petition, Point X, pp. 10, 74-77).

The evidentiary matters referred to by petitioner in his *statement on appeal below* (Partial Pr. R. 265 mid., 268) and in his Petition here (pp. 74-77), relative to this point concerning the $20,019.05 insular inheritance tax illegally paid by him on non-hereditary assets, were all rejected by both insular courts. Petitioner even recognizes that "the contract provides that the heirs acknowledged the fund transferred [$320,306.53] to be of the exclusive and sole property of partnership Mario Mercado e Hijos and to have been so * * *" (Petition, p. 74 bot.; Partial Pr. R. 266 top).

Thus, *this purely local question was passed upon by the Ponce district court upon the evidence introduced by the parties,* as follows:

"With respect to part (B) of said impeachment No. 12, in connection with a restitution to the objectors of the sum of $20,019.15, as half of the inheritance tax paid on monies belonging to the partnership Mario Mercado e Hijos but which were improperly declared in the notice of decease of decedent Mario Mercado Montalvo, *the court, as a result of the evidence introduced by both parties, concludes, and it so holds, that said $320,306.53, as covenanted in clause third, letter (d) of the contract of compromise of September 9, 1938, exclusively belonged to the partnership Mario Mercado e Hijos, an entity distinct and apart from the decedent. And, therefore, said sum of $320,306.53 was improperly included by the executor as part of the cash assets, in his notice of decease of the testator Mario Mercado Montalvo, and, therefore, the inheritance tax paid upon aforesaid amount should not have been paid by the executor and charged to the estate of aforesaid testator.*

"Therefore, the court is of the opinion, and it so holds, that it should also sustain part (B) of impeachment No. 12, and that, therefore, it should order, and hereby orders, that the executor make restitution to the final accounts with legal interest, to the objectors, of the sum of $20,019.15, which is one-half of the inheritance tax improperly paid by said executor on a sum of money belonging exclusively to the partnership Mario Mercado e Hijos" (Partial Pr. R. 79, italics ours).

The supreme court of Puerto Rico did not, in any way, modify this aspect of the trial court's decision, but, on the contrary, affirmed it in all respects (Partial Pr. R. 134 bot., 142 mid., 192 bot.).

In short, as to the preceding questions, petitioner merely seeks disturbance of findings of fact under local law, concurred in by both insular courts, wholly supported by the evidence adduced and in perfect accord with local practice.

Petitioner evidently misconceives the function of appellate courts. Nothing is left to this review but, in effect, a request to conduct a trial *de novo*. It is enough if any substantial evidence supports the judgment. In addition to *Rule 39(b)* of the court of appeals, and to well known federal decisions precluding appellate intervention in cases appealed from the insular supreme court of Puerto Rico, except in presence of inescapable or patent errors, a United States statute generally prohibits reversal even for established errors of fact. 28 U. S. C. A., § 879.[22]

4. *Asserted errors concerning $2,625.00 (half of $5,250) of testator, entered as "Fondo Panteón Familia" in the books of firm Mario Mercado e Hijos* (Petition, Point XI, p .10); *as to $11,234.16, misused, out of hereditary funds, in property of petitioner* (Petition, Point XII, p. 11); *and regarding $5,721.52, illegally paid to third persons* (Petition, Point XIII, p. 11 mid.), *all of which petitioner was ordered to restore.*

Petitioner has conceded that the above issues are *"of local law"* (Petition, 7, 10-11). A perusal of the decisions below will suffice to convince that there is no ground requiring appellate intervention with the determinations of the local courts thereon; also that the court of appeals was

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[22] This statute provides: "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error * * * for any error in fact." This provision applies to appeals which have been substituted for writs of error. Act of January 31, 1928, c. 14, 45 Stat. 54, 28 U. S. C., § 861 (b); R. S. § 1012, 28 U. S. C. A., § 880. See *United States* v. *Lambert*, 146 F. 2d 469, syll. 2, 3; *MacHale* v. *Hull Co.*, 16 F. 2d 783, syll. 3; *Arkansas etc. Co.* v. *Blackwell*, 87 F. 2d 50, syll. 8; *Perrin* v. *Wiggins*, 57 F. 2d 622, syll. 2; *Westchester County Park Comm'n* v. *United States*, 143 F. 2d 688, syll. 17, p. 695, cert. den. 323 U. S. 726.

wholly correct in finding that "Not only can we discern no 'clear or manifest' error, or anything 'inescapable wrong' • • • in the decision of either of these questions of purely local concern, or of any of the multitude of other similar questions presented, but we cannot even discern any error at all in their decision" (Partial Pr. R. 369 bot.; 167 F. 2d 208, col. 2 mid.).

a. *Chose in action of $2,625 (Fondo Panteón Familia)* (Petition, Point XI, p. 10 bot.).

Petitioner was also ordered to include in his accounts a chose in action amounting to $2,625 (half of $5250), which belonged to decedent and was deposited and entered as *"Fondo Panteón Familia"* in the books of the firm Mario Mercado e Hijos (Partial Pr. R. 187 bot., *Mercado* v. *Mercado*, 66 D. P. R. at pp. 98-101, Spanish edition).

The supreme court of Puerto Rico modified and affirmed this item as follows:

> "X. The appellant contestants requested the inclusion in the final account of the executor, of the sum of $5,250, which appears in the books of Mario Mercado e Hijos under the title *'Fondo Panteón de Familia'* (Family Burial Vault Fund). The lower court denied the inclusion sought. The appellants urge that such a denial is erroneous. *Let us look at the facts.*
>
> "Doña Eufemia Riera Dubocq had been granted an award for damages sustained by her in consequence of the sinking of the S.S. 'Carolina', which was torpedoed by a German submarine in 1917. After this lady had died, her surviving husband, Don Mario Mercado, received the sum of $4,608.96 in payment of the amount of the award together with interest thereon. The District Court of Ponce designated the widower as the administrator of that sum, which was deposited in Banco de Ponce in an account entitled

'Mario Mercado and Family.' On June 22, 1931, when the deposit amounted to $5,250, the administrator withdrew it from the bank and transferred it to the partnership Mario Mercado e Hijos, in whose account books it appears under the title *'Fondo Panteón Familia'*, it being stated in the voucher that the money was derived from 'cash delivered by Don Mario Mercado Montalvo for repairs and completion of the family burial vault.'

"The order appealed from, in its dispositive part reads thus:

> 'When the amount of the award granted by reason of the sinking of S.S. "Carolina" was received, Mr. Mario Mercado Montalvo was alive and his wife had already died; at the time of the sinking of the Carolina, Doña Eufemia Riera Dubocq was married to Mario Mercado Montalvo and the award was made to "damages, physical suffering, and material damages" (sic) sustained by Doña Eufemia Riera Dubocq.
>
> 'There is no doubt that the award for damages recovered belonged *to the conjugal partnership.* (Sections 1301 and 1307 of the *Civil Code,* 1930 ed; *Vázqueez* v. *Valdés,* 28 P.R.R. 431; and numerous cases decided by the Supreme Court of Puerto Rico).
>
> 'The four children of the marriage, as heirs, are the sole and exclusive owners of the $5,250, amount of the damages, which was deposited in the civil partnership Mario Mercado e Hijos, now composed of those same four heirs.
>
> 'The court thinks, and it so declares, that that sum, belonging as it does to the heirs, should be included in the general inventory of the estate among the properties subject to partition, and should be delivered by the partnership Mario Mercado e Hijos which holds it as bailee, as soon as a

demand is made upon it therefor. (Sections 1666 and 1675 of the *Civil Code*, 1930 ed.).

'But, passing now upon the additional opposition marked with the letter (F), which relates to the final account of the executor, the court thinks, and it so holds, that "said sum of $5,250 has never been delivered to Mario Mercado Riera in his capacity as executor of Mario Mercado Montalvo and, consequently, its inclusion in the final account of the executorship is not proper." (Sections 54 and 55 of the Law of Special Legal Proceedings, embodied in Sections 587 and 588 of the Code of Civil Procedure, 1933 ed.).

'Therefore, the court considers that it should dismiss and does hereby dismiss, the additional opposition marked with letter (F)." Rec. pp. 90-93.

"The order appealed from is partly erroneous and should be modified.

"If, as the lower court correctly stated, the sum of $5,250 belonged to the conjugal partnership which existed between Don Mario Mercado and his wife, upon the dissolution of that partnership by the death of the wife, *the ownership of one-half of said sum passed to her four heirs as a part of their maternal inheritance, and the other half became the property of the widower, Mario Mercado Montalvo, as his share in the dissolved conjugal partnership. Upon the death of Don Mario, the one-half portion which belonged to him, passed in equal shares to his four heirs. The latter are, therefore, the owners of the whole of the compensation award, one-half of which they acquired by inheritance from their mother and the other half as a part of the paternal inheritance.*

"The accounting executor can not be compelled to include in his account the one-half portion inherited by the four heirs from their mother, inasmuch as it does not form a part of the estate of Mario Mercado

Montalvo. *But he can and should be compelled to include in the inventory and in his final account the one-half of the compensation award which belonged to the decedent as his share in the community property.*

"The decision appealed from should be reversed. In lieu thereof the accounting executor should be ordered to include in the inventory and in his final account a credit for $2,625, that is, the one-half share belonging to the decedent out of the item '*Fondo, Panteón Familia*', which shows a total of $5,250, according to the account books of Mario Mercado e Hijos" (Partial Pr. R. 187 bot.-190 mid., 195 mid.).

b. *The $5,721.52 illegally paid by petitioner to third persons out of hereditary funds* (Petition, Point XIII, p. 11).

As stated by the insular supreme court, the ex-executor (petitioner herein) "*disregarded the law*" (Partial Pr., R. 175 top) by illegally paying to several persons the sum of $5,721.52, wherefore he was ordered to refund the said amount (Partial Pr. R. 194 mid.).

This, petitioner apparently claims to be an error of *local law,* and respondents further maintain there was clearcut evidence plainly exhibiting illegality for the petitioner's disbursements, as correctly adjudicated by the Puerto Rico supreme court in these words:

> "I. The item of the final account entitled 'Aid to impecunious persons' for $5,721.52, was approved. The appellant heirs [respondents herein] urge that the lower court erred in not directing the executor to restore that sum to the assets of the estate * * * [Partial Pr. R. 173 top]
>
> * * * * * * * * *
>
> "After considering the case dispassionately and calmly, we must agree with the appellant contestants

[respondents here] that the payments made to impecunious persons and invalids did not constitute a testamentary charge. *The will failed to show that the testator had made any legacy or provision in favor of indeterminate poor or indigent persons. In all the legacies and life pensions instituted by the testator the names of the beneficiaries were set forth but they did not include the names of the persons to whom the executor made payments after the death of the decedent.*

"The payments made by Don Mario Mercado during his life-time and as an act of pure liberality to certain persons, did not bind him or his heirs to continue making them after his death.

"The contention of the appellee executor that in making those payments to impecunious persons *he had acted in obedience to confidential instructions* received from the testator on several occasions, *has no foundation in law for it would be equivalent to admitting the legality of secret trusts which are rejected by subdivision 4, Section 714 of the Civil Code* (1930 ed.), according to which the following shall be inoperative: 'Those (provisions) the object of which is to leave to a person the whole or part of the inheritance in order that he may apply or invest it, according to secret instructions given him by the testator.' Maura, *Dictámenes,* Vol. IV, pp. 163, 164.

"The theory of the executor that the proven facts show the existence of *a contract of 'life annuity'* which bound Don Mario in favor of those impecunious persons, *is not tenable either.*

"A contract of 'life annuity' is an aleatory contract whereby the debtor binds himself to pay a pension to one or more specified persons for life in return for a principal sum in personal or real property, the ownership of which is at once transferred to the debtor, charged with the payment of the pension. Section 1702, *Civil Code,* 1930 ed. 'The contract is rather a

donation or a legacy, according as it is made *inter vivos* or *mortis causa.'* Manresa (1907 ed.) Vol. 12, p. 61.

"Besides a life annuity constituted for a valuable consideration (Section 1702, *Civil Code,* supra), the law acknowledges the possibility of an annuity being gratuitously constituted by a person on his property, and in such case the annuity has the character of a donation or benefaction made by the donor. 12 *Manresa Civil Code,* 1907 ed., p. 89. *A life annuity constituted gratuitously is governed by the general rules pertaining to gifts. 27 Enciclopedia Jurídica Española,* p. 220.

"Since the will contains no provision which would authorize the executor to make any payment to impecunious persons, and since no real property has been encumbered to secure the payment of the life annuities sought to be established in this case, those annuities must be governed by the legal provisions applicable to gratuitous gifts of personal property made *inter vivos.* Section 269 of the *Civil Code,* 1930.

"*Section 574 of the same code provides that gifts of personal property, such as money, may be made verbally* or in writing, *and that:*

> *'The verbal one requires the simultaneous delivery of the thing bestowed as a gift. In the absence of this requisite the gift shall produce no effect* if not made in writing and if the acceptance does not appear in the same manner.'

"*The evidence introduced shows that the decedent used to give aid to a number of necessitous persons by giving them certain sums weekly. No written or documentary evidence has been introduced to show that the decedent bound himself to continue making those weekly payments during his own lifetime or that of each of the donees.* And we have already seen that in his will he failed to make any legacy or to encumber

any real property for the purpose of paying those benefactions after his death. *The gift which the decedent bestowed weekly on his proteges were consummated by the delivery of the donated funds to each of the donees. A gift made verbally on the above-stated circumstances does not carry with it any implied promise or obligation to make future payments. 5 Manresa, Civil Code, 116, 118.*

"The lower court erred in not ordering the restoration of the amount paid. The order appealed from should be modified in the sense of directing the restoration of the amount of said item" (Partial Pr. R. 175 top-177 mid.).

c. *As to the $11,234.16 improperly diverted by petitioner from hereditary assets for use on property belonging to himself* (Petition, Point XII, p. 11).

Both the trial court and the local supreme court decreed that the petitioner should return the amount of $11,234.16 as illegally invested by him out of the coheirs' funds, in an urban property known as Marina No. 23, after he had become its sole owner (Partial Pr. R. 58-59; *ib.*, 150 mid.-151, *Mercado* v. *Mercado,* 66 D. P. R. at pp. 62 bot., 63, Spanish edition).

In this connection, petitioner's complaint before the court of appeals seemed to be that there was some sort of *conflict* in the evidence (Partial Pr. R. 271-274, *St. on App.*). But the short answer, as heretofore pointed out, is that the function of appellate tribunals is not to pass on alleged conflicts of evidence, if there is any substantial proof (footnote 23, *ante*) supporting the court's findings, especially so under *Rule 39(b)* of the Court of Appeals if the case hails, as here, from the Supreme Court of Puerto Rico.

That there is not the slightest error of any sort in passing upon the item now considered, will be most cogently

established by the pertinent portions of the decisions below.

As the Ponce trial court held:

> "'Restoration of Marina St. No. 23 House, $24,434.16.'
>
> "*Decision and Order. The court, after considering the evidence introduced by both parties, finds that the following facts, among other, have been proved:*
>
> "In the contract of compromise (Exhibit No. 2) of September 9, 1938, and by its clause first, letter (I), there was awarded to Mario Mercado Riera aforesaid house located on Marina Street and the adjoining lots, and, at the same time, there was definitely acknowledged, as correct disbursements from the hereditary estate, the sum of $14,200 of the expenses incurred by the executor in connection with the contract authorized by said decedent Mario Mercado Montalvo in connection with the house on Marina Street and the adjoining lots.
>
> "*Mario Mercado Riera* (the executor), *after said house on Marina Street No. 23 had been conveyed to him, continued spending money on the restoration of said house up to February 29, 1940, amounting to an additional sum of $11,234.16, which is the amount impeached by the objectors.*
>
> "The court agrees with all of the arguments of the objectors as set forth in their brief in support of this impeachment and adopts them, although he [it] does not set them forth herein for the sake of brevity; *it being sufficient, for the purpose of deciding the question, that as has been proved, Mario Mercado Riera * * * is the full owner of all the house located on Marina Street No. 23, and has been the owner thereof from September 9, 1938, when the contract of compromise was signed; the court holding that since the day on which Mario Mercado Riera became the absolute*

owner of said house, it became his obligation, and not that of the Succession of the decedent Mario Mercado Montalvo, to pay all expenses thereon exceeding the covenanted sum of $14,200.

"Wherefore, the court is of the opinion and so holds, that it should sustain, and hereby does sustain impeachment No. 1 and therefore orders, that the executor make restitution to the assets of the final account, of the sum of $11,234.16, *plus the legal interest*[24] of 6 per cent per annum on said sum, from February 29, 1940, which was the date, according to Exhibit No. 21, upon which the last item composing said impeachment sum was incurred" (Partial Pr. R. 58-59).

Upon a careful review of the local law and evidence, the insular Supreme Court affirmed as follows:

"Did the lower court err in refusing to approve, as a proper charge against the estate, the additional

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[24] The local rule of law is that where a person occupying a *fiduciary relation* misuses or applies to his own use funds entrusted to him which belong to another, the latter is entitled to *interest* thereon if no profits have been made from such use; if there is any profit, he may choose between claiming interest or the profits. To hold the contrary, "would be tantamount to rewarding him for his unlawful act." This doctrine "covers all persons occupying a fiduciary relation with respect to others." *McCormack* v. *González*, 49 P. R. R. 460, syll. 3, pp. 467 mid., 469 near top, 480 mid.

Yet, no question was raised by petitioner in the local Supreme Court respecting interest; and points not involved or raised below cannot be urged on appeal. *Supreme Forest etc.* v. *City of Belton*, 100 F. 2d 655; *Mauro* v. *Rodríguez* (C. C. A., 1), 135 F. 2d 555, col. 1, mid.; *Baetjer* v. *U. S.* (C. C. A., 1), 143 F. 2d 392, syll. 14; *Helvering* v. *Tex-Penn Oil. Co.*, 81 L. ed. 755, syll. 4, p. 766, col. 2, mid.; *Helvering* v. *Minn. Tea Co.*, 80 L. ed. 284, syll. 1; *Ex parte Franceschi*, 53 P. R. R. 73, syll. 4, p. 76 mid. (No question of interest was raised on the previous appeal); *Graniela* v. *Yolande, Inc.* (1946), 65 P. R. R. 664, syll. 3, and at p. 667 top (Once a judgment is affirmed, trial court lacks power to reconsider it as to any question—interest—that could have been, but was not, raised in local supreme court).

expenditure amounting to $11,234.16 on the restoration of the house at No. 23 Marina St.? Such is the question involved in the fourth assignment.

"Under the terms of the compromise contract of September 9, 1938 (First Clause, subdivision (1)), the house designated as 'Marina No. 23' was awarded to the heir Mario Mercado Riera, appellant executor herein, and the contracting heirs acknowledged *as a proper charge against the hereditary estate, the sum of $14,200* which up to that date had been invested by the executor in the restoration of that immovable. *The evidence shows that after the house had been thus awarded to him, the executor continued the work of restoration until February 29, 1940, and invested the additional sum of $11,234.16, which is challenged by the opposing heirs.*

"*The holding of the lower court is, in our judgment, correct.* Upon signing the compromise contract, the heir Mario Mercado accepted, as part of his hereditary share, a partially restored house, in which the sum of $14,000 had been invested, with the assent of all the heirs. *From that moment the above-named heir* [petitioner herein] *acquired the full ownership of the house and of the money invested in it. We fail to find in the compromise contract or in the evidence introduced, anything to show that the heirs had agreed to pay any additional expenses which the new owner of the property might have to incur in or ler to finish the restoration of the house*" (Partial Pr. R. 150-151, 192 bot.).

B. The decision of the Puerto Rico Supreme Court, affirmed by the Court of Appeals, should not be disturbed.

Nothing has been shown pointing to any violence done to local laws or the established practices in the Island. On the contrary, a most cursory glance at the insular supreme court's considerations and findings, clearly demonstrates

that they are, not only fully sustained by the evidence, but also reasonable, logical and in complete harmony with insular statutes, principles and prior decisions regarding the esoteric points of traditional Spanish law involved and most carefully examined and adjudicated by the Island's courts.

As held by the Court of Appeals (Partial Pr. R. 370 top), it is obvious that additional arguments by petitioner will not develop any point or issue, or any question of deference due to local decisions, so substantial as to preclude the summary disposition of the appeal under Rule 39(b) of the court below. *Hijos* v. *Commins,* 88 L. ed. 1396, 1399, col. 2 mid.; see *Sosa* v. *Sosa* (C. C. A. 1), 164 F. 2d 94.

This is so, as the judgment *a quo* is patently right respecting petitioner, Mario Mercado Riera. A *fortiori,* if it be recalled that, to justify disturbing judgments of the Puerto Rico Supreme Court, any alleged errors must be proven to be clear or manifest; the local "interpretation must be inescapably wrong; the decision must be patently erroneous." *Bonet* v. *Texas Co.* (*P. R.*) *Inc.,* 84 L. ed. 401, 406, col. 1 top; *Bonet* v. *Yabucoa Sugar Co.,* 83 L. ed. 947, 949, col. 2 mid.; *Puerto Rico* v. *Rubert Hermanos,* 86 L. ed. 1081, syll. 1 and 2, p. 1088, col. 2 mid., 315 U. S. 637, 646; *De Castro* v. *Board of Commissioners,* 88 L. ed. 1384, 322 U. S. 451; *Hijos* v. *Commins,* 88 L. ed. 1396, 322 U. S. 465. And certainly, the judgment of the insular supreme court, far from being erroneous, is "patently correct" (Partial Pr. R. 369 bot.).

Conclusion

For the reasons above stated, respondents submit and respectfully request that the petition for certiorari or mandamus herein, should be dismissed or denied.

Respectfully submitted.

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